

1989

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Recommended Citation

Eric Schnapper, *"Libelous" Petitions for Redress of Grievances -- Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989), <https://digitalcommons.law.uw.edu/faculty-articles/298>

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“Libelous” Petitions for Redress of Grievances—Bad Historiography Makes Worse Law

Eric Schnapper*

In *McDonald v. Smith*¹ the Supreme Court faced the type of challenge long threatened by the Reagan administration—an argument that one of the Warren Court’s landmark decisions, together with much of its intellectual progeny, was inconsistent with the original intent of the framers of the Constitution. The decision called into question was *New York Times v. Sullivan*,² which had held that the first amendment permitted state courts to award libel judgments to public figures only if there was clear proof that the libel defendant knew that his statements were false, or had acted in reckless disregard of the truth of those remarks.³ *New York Times v. Sullivan* had long been a favorite target of conservative theorists.⁴ In *McDonald v. Smith*, however, the historical criticism came not from the libel plaintiff, but from the defendant, who argued that *New York Times v. Sullivan* provided too little constitutional protection, rather than too much, when the alleged libel was contained in a petition for redress of grievances.

The litigation in *McDonald* arose as a result of the proposed selection of David Smith as United States Attorney for North Carolina. Robert McDonald, the operator of several child-care centers in the state, wrote letters opposing Smith’s selection to then President-elect Reagan, as well as to Presidential adviser Edwin Meese, the Director of the FBI, and four members of Congress.⁵ McDonald accused Smith of “violating the civil rights of various individuals while a Superior Court Judge,” “fraud,” and “violations of professional ethics,”⁶ and referred to a number of specific incidents which McDonald claimed substantiated his allegations.⁷ After another candidate was selected as U.S. Attorney, Smith sued McDonald for libel, alleging that McDonald’s charges had cost him the job, injured his professional reputation, and caused him “humiliation, embarrassment,

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1. 472 U.S. 479 (1985). The only commentary on *McDonald* is in Smith, “*Shall Make No Law Abridging . . .*”: An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153 (1986).

2. 376 U.S. 254 (1964).

3. *Id.* at 279-80.

4. See B. FEIN, NEW YORK TIMES V. SULLIVAN: AN OBSTACLE TO ENLIGHTENED PUBLIC DISCOURSE AND GOVERNMENT RESPONSIVENESS TO THE PEOPLE 3-6 (Am. Legal Found. 1984).

5. *McDonald*, 472 U.S. at 481 & nn.1-2.

6. *Id.* at 481.

7. Joint Appendix at 8-16, *McDonald v. Smith*, 472 U.S. 479 (1985) (No. 84-476).

anxiety and mental anguish."⁸ Smith did not claim that McDonald had shown the letter to anyone but the seven federal officials to whom it had been sent, or that he had repeated the allegations to anyone else; evidently those charges became known to the public only when Smith brought his libel action.

Smith filed his action in state court, and McDonald removed the proceeding to federal district court. The district court and the fourth circuit agreed that McDonald's letters fell within the scope of the petition clause of the first amendment,⁹ but held that a defendant could be mulct in damages for submitting a petition for redress of grievances if a plaintiff could prove that the petition contained an inaccurate statement and that the defendant either knew the statement was false or had acted in reckless disregard of the truth.¹⁰

McDonald contended in the Supreme Court that libel actions could never be founded on the contents of a petition, but the Court unanimously rejected that argument. Both the majority opinion by Chief Justice Burger and a concurring opinion by Justice Brennan emphasized that *New York Times v. Sullivan* had established for ordinary speech a lesser, nonabsolute protection from libel suits.¹¹ Chief Justice Burger argued "[t]o accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status."¹² Justice Brennan noted that according absolute immunity to petitions, rather than merely creating a minor exception to the rule in *New York Times v. Sullivan*, would substantially alter the constitutional principles applicable to libel actions, since "the Petition Clause embraces a . . . broader . . . range of communications addressed to the executive, the legislature, courts, and administrative agencies . . . [and] includes such activities as peaceful protest demonstrations,"¹³ and that such absolute immunity for petitions would have encompassed the very statements at issue in *New York Times v. Sullivan* itself.¹⁴

Both the majority and concurring opinions in *McDonald* concluded that there was no historical basis for McDonald's contention that the framers understood the right to petition to include an unqualified right to do so without being subject to suit for libel.¹⁵ This Article argues that the historical analysis in *McDonald* is incorrect; indeed, this appears to be one instance in which the relevant historical materials are both voluminous and

8. *McDonald*, 472 U.S. at 481 (quoting Joint Appendix at 6, *McDonald v. Smith*, 472 U.S. 479 (1985) (No. 84-476)).

9. "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. 1.

10. See *Smith v. McDonald*, 562 F. Supp. 829, 843 (M.D.N.C. 1983) (establishing these requirements to show actual malice); see also *Smith v. McDonald*, 737 F.2d 427, 429 (4th Cir. 1984) (holding libel plaintiff recovers damages by showing express malice).

11. *McDonald*, 472 U.S. at 484-85; *id.* at 486-90 (Brennan, J., concurring).

12. *Id.* at 485; see also *id.* at 490 (Brennan, J., concurring) ("There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States.").

13. *Id.* at 488 n.2 (Brennan, J., concurring).

14. *Id.* at 489 n.3 (Brennan, J., concurring).

15. *Id.* at 484; *id.* at 488 (Brennan, J., concurring).

crystal clear. Part I evaluates the *McDonald* Court's discussion of the intent of the framers.¹⁶ Subsequent sections discuss the wide variety of materials that the Court failed to consider; Part II explains the origins of the petition clause in England's 1689 Bill of Rights,¹⁷ Part III summarizes the pre-1791 case law holding that a libel action could not be founded on the contents of a petition,¹⁸ and Part IV sets forth the discussion of the same issue in eighteenth century legal tracts.¹⁹ Part V discusses the specific right to petition within the broad context of the first amendment.²⁰ The Article concludes that the degree of protection from libel suits now accorded to criticism of government conduct is seriously deficient and significantly weaker than existed in 1791.²¹

I. THE HISTORICAL ANALYSIS IN *McDONALD*

The decision in *McDonald* suffers on its face from two distinct infirmities. First, the opinion does not even purport to discuss any seventeenth- or eighteenth-century materials that might reveal the contemporaneous understanding of the petition clause, but relies instead solely on postratification materials. Second, *McDonald* creates an unjustifiable distinction in the treatment of libel suits between public officials and private citizens. When an official and a citizen exchange derogatory and arguably inaccurate public attacks on one another, the official is virtually immune from any libel action—even if the official deliberately lied—but is entitled to pursue just such an action against his or her private critic. This distinction, under a constitutional system which sanctifies both free speech and the democratic process, seems anomalous if not bizarre.

Probably the most provocative line in *McDonald* is to be found in Justice Brennan's concurring opinion, which noted that he "agree[d] with the Court that the evidence concerning 17th- and 18th-century British and colonial practice reveals, at most, 'conflicting views of the privilege afforded expressions in petitions to government officials' . . . and does not persuasively demonstrate the Framers' intent to accord absolute immunity to petitioning."²² The difficulty with this observation can be simply stated—neither the majority opinion nor the concurring opinion contain any reference whatever to colonial practice, or to eighteenth-century British libel law.²³ The sole reference to seventeenth-century libel law was a citation to *Lake v. King*,²⁴ which squarely held that statements in petitions *were* absolutely privileged.²⁵ Justice Brennan declined to discuss *Lake v. King*,

16. See *infra* text accompanying notes 22-72.

17. See *infra* text accompanying notes 73-155.

18. See *infra* text accompanying notes 156-208.

19. See *infra* text accompanying notes 209-36.

20. See *infra* text accompanying notes 237-49.

21. See *infra* text accompanying notes 250-54.

22. *McDonald*, 472 U.S. at 488 (Brennan, J., concurring) (quoting the majority, *id.* at 483).

23. The Court noted that as late as the 1790s the right to petition was still under attack in England. *Id.* at 484 n.5. The attack at issue, however, had nothing to do with the extent, if any, to which a petition could give rise to a libel action.

24. 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K.B. 1668-69).

25. See *infra* text accompanying notes 185-92.

and the majority expressly refused to follow it.²⁶

Justice Brennan's inaccurate description of the majority opinion is significant because the opinion correctly recognized the best guides to the original understanding of the framers, at least in those instances when a clear understanding can be said to have existed. Other than their own contemporaneous remarks, the framers' intent would ordinarily be evaluated by reference to the body of law, theory, and historical practice with which the framers were likely familiar and which they could fairly be assumed to have had in mind when they drafted and approved the Constitution and Bill of Rights. The decision in *McDonald* actually relied instead on a handful of nineteenth-century authorities, particularly the Supreme Court's 1845 decision in *White v. Nicholls*.²⁷ Such postratification materials are necessarily of decidedly lesser weight than documents that might have been read by or known to the framers. Nineteenth-century authorities may nonetheless be of use in two distinct ways. First, if they directly address the meaning of a constitutional provision and were written at the very outset of the century, they may fairly reflect the understanding of the generation that participated in the framing of the provision involved.²⁸ Second, even if written later in the nineteenth century, such later authorities may be useful in identifying historical materials that shaped the understanding of the framers, since those materials were often more familiar to judges and scholars of the last century than to those of our own.

But neither *White v. Nicholls* nor any of the other nineteenth century authorities cited in *McDonald* are of such significance to the interpretation of the petition clause. *White* itself was decided in 1845, some 54 years after the drafting of the Bill of Rights, far too late to reflect any contemporaneous understanding. The *McDonald* Court, noting that *White* had characterized *Lake v. King* as "anomalous," implied that *White* had somehow purported to provide guidance as to the state of the law and the intent of the framers in 1791:

26. *McDonald*, 472 U.S. at 483 n.4.

27. 44 U.S. (3 How.) 266 (1845).

There is a significant possibility that the decision in *White* was affected by extraneous considerations. During the second quarter of the nineteenth century the controversies regarding the right to petition were the central battleground between abolitionists and proponents of slavery. The abolitionists deluged Congress with large numbers of petitions, using the petition-signing campaign to win over public opinion as well as to attempt to influence Congress. The proslavery officials responded by imposing in the House and Senate a "gag" rule against consideration of the petitions and by prosecuting individuals who circulated them in slave states; Southerners denounced the abolitionist petitions as deliberate acts of sedition. See G. BARNES, *THE ANTI-SLAVERY IMPULSE 1830-1844*, at 110-96 (1964); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1864*, at 183-87 (1977); Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 158-65 (1986). A decision in *White* according absolute protection to petitions would have been a major legal and moral victory for the abolitionists. The Supreme Court in this era had little sympathy for the abolitionist cause. Justice Daniels of Virginia, who wrote *White*, was "the extreme defender of states' rights, and . . . the extreme sectionalist and radical partisan in the slavery question." 1 *THE JUSTICES OF THE SUPREME COURT 1789-1978*, at 800 (L. Friedman & F. Israel ed. 1980).

28. Cf. L. LEVY, *EMERGENCE OF A FREE PRESS* 280 (1985) (arguing postratification material unacceptable as evidence of framers' intent).

In *White v. Nicholls* . . . this Court dealt with the proper common-law privilege for petitions to the Government. . . . The Court, after reviewing the common law, concluded that the defendant's petition was actionable if prompted by "express malice," which was defined as "falsehood and the absence of probable cause." . . . Nothing presented to us suggests that the Court's decision not to recognize an absolute privilege in 1845 should be altered; we are not prepared to conclude, 140 years later, that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in the exercise of that right.²⁹

Although nothing in this passage is an outright falsehood, all of the implications which make it relevant to *McDonald* are in fact misleading. First, *White* did not purport to make any comment about the intent of the framers of the first amendment. Second, *White* pretended neither to interpret, nor even to mention, the first amendment. Third, although rejecting the holding in *Lake*, *White* did not assert that *Lake* was bad law in 1791, and did not claim to be expounding the state of the common law in the late eighteenth century. On the contrary, *White* criticized *Lake* as inconsistent with "the modern adjudications of the courts";³⁰ whatever "modern" may have meant in 1845, it certainly would not have been understood to refer to judicial decisions then at least fifty-four years old.

The quotation from *McDonald* set out above also deliberately ignored the actual basis of the decision in *White*. The plaintiff in *White* premised his argument on the assumption that a libel action could be based on statements made in the course of a judicial proceeding, so long as the libel plaintiff could prove that the statements had been made with malice.³¹ Against that background, the central argument which was made by the plaintiff in *White*, and which was endorsed by the Supreme Court in that case, was that the degree of protection for petitions and for assertions relating to judicial proceedings should be the same.³² The Court in *White* agreed that statements made in connection with judicial proceedings would be actionable if made with malice: "With respect to words used in a course of judicial proceeding, it has been ruled that they are protected by the occasion, and cannot form the foundation of an action for slander without proof of express malice" ³³ The absolute privilege for petitions recognized by *Lake*, the Court in *White* concluded, was "anomalous" solely because it was different from, and would have been greater than, the privilege for statements in court:

[*Lake v. King* is in] conflict with the current of authorities going to maintain the position that express malice cannot be shielded by any judicial forms. . . . The Parliament, it is said, is a court, and it is difficult to perceive how malicious and groundless prosecutions before it can be placed on a ground of greater impunity than they

29. *McDonald*, 472 U.S. at 484 (footnote omitted).

30. *White*, 44 U.S. at 289 (emphasis added).

31. *Id.* at 279-80 (argument for plaintiff in error).

32. *Id.*

33. *Id.* at 287.

can occupy in another appropriate forum. The case of *Lake v. King*, therefore, interpreted by the known principles of the law of libel, would extend the privilege of the defendant no farther than to require as to him proof of actual malice. A different interpretation would establish, as to such a case, a rule that is perfectly anomalous, and depending upon no reason which is applicable to other cases privilege.³⁴

Having established that the degree of privilege accorded to petitions and to judicial proceedings ought to be the same, *White* then held that that privilege consisted solely in the rule that malice could not be presumed, but had to be proven.³⁵

The actual reasoning in *White*, equating the privilege accorded to judicial proceedings and to petitions, was critical to the issue in *McDonald*. *White* would have supported the result in *McDonald* if in 1885, as in 1845, the Supreme Court believed that the privilege for judicial proceedings was only the limited protection recognized in *White*. But on repeated occasions prior to *McDonald* the Supreme Court had expressly disavowed *White*'s treatment of the protection accorded to judicial proceedings and had held that in that situation the privilege against libel actions was indeed absolute. These disavowals were not based on any intervening developments in the law, but on the Court's conclusion that *White* had misstated the law as it existed in the mid-nineteenth century regarding statements made in the course of judicial proceedings. In 1895 the Court held that a line of decisions "extending from the time of Lord Coke to the present time" protected a judge from any action for slander based on words spoken from the bench³⁶ and cited a nineteenth-century English decision for the

34. *Id.* at 289-90.

35. The Court's conclusions about the limited scope of the privilege for petitions and assertions made in judicial proceeding are set forth below:

1. That every publication . . . which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. . . . 2. That the description of cases recognised as privileged communications, must be understood as exceptions to this rule, and as being founded upon some apparently recognised obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude then that malice may be proved, though alleged to have existed in the proceeding before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance presented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel.

Id. at 291-92.

36. *Spalding v. Vilas*, 161 U.S. 483, 495 (1896).

proposition that counsel, witnesses, and parties were also absolutely immune "for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law."³⁷ The Supreme Court reiterated that principle in 1976: "In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding."³⁸ The Supreme Court cited as "the leading case" a Massachusetts decision handed down in 1841, four years before *White*.³⁹ Most recently, in *Briscoe v. Lahue*,⁴⁰ decided barely two years before *McDonald*, the Supreme Court dismissed *White*'s rejection of absolute immunity for statements in judicial proceedings as "not . . . a reliable statement of the common law," noting that even in the mid-nineteenth century, *White* was generally regarded as wrongly decided.⁴¹ Under these circumstances, the central issue in *McDonald* was whether, as *White* had held a century earlier, and as McDonald argued,⁴² the degree of privilege accorded to petitions would be the same as that relating to judicial proceedings. By according a lesser degree of protection to petitions, the Supreme Court in *McDonald* actually rejected the reasoning of *White*, and created precisely the "anomaly" of differing standards that *White* had condemned.

The other citations in *McDonald* fare no better. Emphasizing that the Pennsylvania Declaration of Rights contained a right to petition for redress of grievances,⁴³ *McDonald* quoted at length the 1815 Pennsylvania decision in *Gray v. Pentland*,⁴⁴ which held that malicious aspersions on the character of a plaintiff were actionable even though the defendant had voiced that criticism to the governor in a petition seeking the removal of that plaintiff from public office.⁴⁵ But *Gray* did not, as *McDonald* suggested, provide "evidence of the nature of the right to petition as it existed at the time the First Amendment was adopted."⁴⁶ The right to petition for redress of grievances embodied in the Pennsylvania Declaration of Rights was expressly applicable only to petitions filed with the state legislature and did not extend to petitions submitted to the governor.⁴⁷ That state guarantee, understandably, was neither relied on by the defendant in *Gray* nor mentioned in that opinion.⁴⁸

37. *Id.* at 497 (quoting *Dawkins v. Lord Rokeby*, L.R. 8 Q.B. 255, 263 (1873), *aff'd* L.R.- E. & I. App. 7 H.L. 744, 754 (1875)).

38. *Imbler v. Pachtman*, 424 U.S. 409, 426 n.23 (1976).

39. *Id.* (citing *Hoar v. Wood*, 44 Mass. (3 Met.) 193, 197-98 (1841)).

40. 460 U.S. 325 (1983).

41. *Id.* at 332-33 n.12.

42. Brief for Petitioner at 29, *McDonald v. Smith*, 472 U.S. 479 (1985) (No. 84-476).

43. *McDonald*, 472 U.S. at 483.

44. 2 Serg. & Rawle 23 (Pa. 1815).

45. *McDonald*, 472 U.S. at 483-84.

46. *Id.* at 483.

47. PENN. DECL. OF RIGHTS art. XVI (1776). "That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance." 2 B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 266 (1980).

48. The state court in *Gray*, like the United States Supreme Court in *White*, concluded that grievances expressed to the governor were entitled to the same degree of protection as judicial proceedings, but held that the immunity granted to both was a qualified one. Chief Justice Tilghman reasoned that assertions made with malice were actionable in either case:

The Supreme Court in *McDonald* also cited the 1808 Massachusetts decision in *Commonwealth v. Clap*⁴⁹ as supposedly rejecting any absolute immunity for petitions. *Clap*, however, did not involve any form of petition⁵⁰ and included no reference whatever to the right to petition in the Massachusetts Declaration of Rights. *Clap* contained only one passage of possible relevance to *McDonald*; the Massachusetts court held that if derogatory charges about a public official were made "maliciously, or with intent to defame," the person making those charges in an attempt to secure the removal of the officer could be prosecuted for criminal libel, even though the allegations were *truthful*.⁵¹ That decision, which reflected a view of libel law repudiated seventy years earlier by the jury in the *Zenger* case,⁵² certainly does not purport to stand for the very different view of the rights to petition and to freedom of speech advocated in *McDonald* itself.

The Supreme Court's earlier decisions that some statements, such as those uttered in judicial proceedings, are absolutely privileged created a second and equally serious problem for the *McDonald* decision. One critical premise of *New York Times v. Sullivan*⁵³ was that in disputes between government officials and members of the public, the degree of protection the first amendment affords against libel suits should not put the private participants at a disadvantage. "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."⁵⁴ The decision in *McDonald* largely destroys that equivalence.

Under many if not most circumstances, government officials enjoy absolute immunity from libel actions in connection with statements related to their official duties. In *Barr v. Matteo*⁵⁵ the Court held that an executive official, acting within the scope of his or her authority, is personally

I consider accusations preferred to the Governor, so far of the nature of judicial proceedings, that the accuser is not held to prove the truth of them. Any thing which satisfies the jury, that the proceeding did not originate in malice, and without probable cause, is sufficient to excuse him. . . . And the law is the same with regard to counsel, who are highly privileged in pleading the cause of their client. If they wantonly depart from the evidence and point in issue, with an intent to injure the character of the adversary, without propriety or probable ground, they are responsible. Nor are even witnesses entitled to any higher protection. They are to speak the truth with freedom, but not to gratify malice under cover of law.

Gray, 2 Serg. & Rawle at 30.

49. *McDonald*, 472 U.S. at 483 (citing *Commonwealth v. Clap*, 4 Mass. 163, 169 (1808)).

50. William Clap had printed a libelous statement about Caleb Hayward, an auctioneer, and posted it "in several public places." The statement read "*Caleb Howard* is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down." *Clap*, 4 Mass. at 163. Massachusetts prosecuted Clap for criminal libel.

51. *Clap*, 4 Mass. at 169; see also *id.* at 168-69:

[T]he defendant cannot justify himself for publishing a libel, merely by proving the truth of the publication. . . . If the law admitted the truth of the words in this case to be a justification, the effect would be a greater injury to the party libelled. . . . [T]he evidence at the trial might more cruelly defame his character than the original libel.

52. See generally A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (S. Katz 2d ed. 1970); L. RUTHERFORD, JOHN PETER ZENGER, HIS PRESS, HIS TRIAL, AND A BIBLIOGRAPHY OF ZENGER IMPRINTS (1904).

53. 376 U.S. 254 (1964).

54. *Id.* at 282-83 (quoted in *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

55. 360 U.S. 564 (1959).

immune from damage suits, even if the official's action injured a particular individual. "[O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits, . . . the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."⁵⁶ In *Briscoe v. Lahue*⁵⁷ the Court explained that even the mere possibility of vexatious litigation might have an undesirable chilling effect on the candor of witnesses at a judicial proceeding: "A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective and undistorted evidence."⁵⁸ Similar reasoning has prompted the Court to recognize that prosecutors⁵⁹ and legislators⁶⁰ are absolutely immune from damage actions, including actions based on allegedly libelous statements, made in the course of their official duties. In *Bradley v. Fisher*,⁶¹ decided 27 years after *White v. Nicholls*, the Court based absolute judicial immunity on the same consideration: "The allegations of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."⁶²

The litigation in *McDonald* arose as a result of letters sent by McDonald to then President-elect Reagan and several other high ranking federal officials, opposing proposals that Smith be nominated to serve as the United States Attorney for North Carolina.⁶³ Most of McDonald's accusations were directed at Smith's conduct as a North Carolina Deputy District Attorney and as a Superior Court Judge.⁶⁴ Under *Barr v. Matteo*⁶⁵ statements made by Smith while he was in those positions were absolutely privileged; *Pierson v. Ray*⁶⁶ precluded McDonald or anyone else from suing Smith in connection with his actions as a judge, and *Imbler v. Pachtman*⁶⁷ barred actions against Smith because of any misconduct as a prosecutor. McDonald's letter reiterated criticism of Smith that had been made by a federal judge and magistrate.⁶⁸ Although these federal officials enjoyed absolute protection from libel actions based on those remarks, McDonald

56. *Id.* at 571.

57. 460 U.S. 325 (1983).

58. *Id.* at 333, 336 n.15.

59. See *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976) (answering charges of wrongdoing would divert prosecutors' energy from the "duty of enforcing the criminal law").

60. See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (privilege "not for their private indulgence but for the public good").

61. 80 U.S. 335 (1872).

62. *Id.* at 354.

63. *McDonald*, 472 U.S. at 480-81.

64. Joint Appendix at 8-13, *McDonald v. Smith*, 472 U.S. 479 (1985) (No. 84-476) (alleging that Smith had been cited for his "obstreperous conduct" as Deputy District Attorney, and that, while serving as temporary Superior Court Judge, Smith was directly involved with the unlawful imprisonment of two individuals.).

65. 360 U.S. 564 (1959).

66. 386 U.S. 547 (1967).

67. 424 U.S. 409 (1976).

68. Joint Appendix at 9, 12, *McDonald v. Smith*, 472 U.S. 479 (1985) (No. 84-476).

was sued for reiterating their charges. The federal officials to whom McDonald wrote similarly enjoyed absolute immunity, either because of their positions in the executive branch or as members of Congress under the speech and debate clause; they could with impunity either have endorsed McDonald's charges, or have denounced McDonald as a liar. If President Reagan and Senator Helms, having reviewed the same evidence as had McDonald regarding Smith's past actions, publicly concluded that Smith had been guilty of unethical and unlawful conduct on the bench or as a prosecutor,⁶⁹ their findings would have been fatal to Smith's chances of selection as U.S. Attorney and severely harmful to his professional stature. Yet only McDonald's identical conclusion, communicated in a private letter to Reagan, Helms, and five other individuals, would have been actionable. Smith's civil complaint, which was far more public than McDonald's original allegations, asserted that McDonald had called Smith a "liar" and claimed in turn that McDonald "knew that [his] statements were false and untrue."⁷⁰ Essentially, Smith asserted that McDonald was in fact the liar; Smith's counter charge, of course, was itself absolutely privileged because it was part of a judicial proceeding. Of all the participants in this controversy, only McDonald lacked any "unqualified right to express damaging falsehoods."⁷¹

The decision in *McDonald*, of course, did not actually award damages against McDonald; it did, however, require McDonald to run the risks and bear the expense of a lawsuit and, in all likelihood, a trial. The absolute immunity accorded by other Supreme Court decisions to the executive, legislative, and judicial participants in the controversy is based in part on a recognition that such risks would impose an intolerable burden on the ability of government officials to speak their minds.⁷²

II. THE 1689 PETITION OF RIGHT AND THE TRIAL OF THE SEVEN BISHOPS

The Supreme Court noted in *McDonald* that the petition clause had its roots in the English Bill of Rights of 1689.⁷³ Having recognized the origin of the clause, however, the Court chose not to inquire further into the circumstances that had led to the framing of this seminal provision in the

69. Such a statement by Helms would apparently have been protected by the speech and debate clause only if made on the floor of the Senate, at a Committee meeting, or otherwise in the course of legislative activity. See *Hutchinson v. Proxmire*, 443 U.S. 111, 124-33 (1979).

70. Joint Appendix at 4, *McDonald v. Smith*, 472 U.S. 479 (1985) (No. 84-476).

71. *McDonald*, 472 U.S. at 484.

72. See *Doe v. McMillan*, 412 U.S. 306 (1973). In *Doe* the Supreme Court reaffirmed the principle that grants members of Congress immunity from liability for their speech within the "legislative sphere." *Id.* at 312 (quoting *Gravel v. United States*, 408 U.S. 606, 624-25 (1972)). The Court further noted: "Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith." *Id.* at 319; see *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979) (Brennan, J., dissenting) ("public criticism by legislatures . . . whatever its form, is a legislative act shielded by the speech or debate clause"). But see *id.* at 130 (majority opinion) (United States Senator may be liable for libelous newsletters and press releases because these communications are not essential to deliberative process).

73. *McDonald*, 472 U.S. at 484.

English Bill of Rights,⁷⁴ or into the possible relevance of those circumstances to Smith's attempt to base his libel action on a petition for redress of grievances. In this section, the Article undertakes what the Supreme Court neglected to do, focusing in particular on the *Seven Bishops Case*,⁷⁵ which was the immediate cause of the petition clause in the 1689 Bill of Rights.⁷⁶ That case makes clear that the English right to petition was adopted, *inter alia*, to bar all libel actions founded on the contents of petitions, even when the charges contained in those petitions were false and malicious.

The origins of the 1689 guarantee are not the least obscure. The English Bill of Rights contains an introduction expressly explaining that Parliament was proclaiming the right to petition for redress of grievances, as well as other rights, because the then recently deposed James II "did endeavour to subvert and extirpate . . . the laws and liberties of this kingdom . . . [b]y committing and prosecuting diverse worthy prelates for humbly petitioning" the King.⁷⁷ The criminal prosecution to which the Bill of Rights referred was one of the most famous proceedings in English constitutional history, the *Seven Bishops Case*.⁷⁸ The 1688 trial of the seven bishops was a subject of nearly universal knowledge and concern when the Bill of Rights was adopted in 1689. The framers of the Bill of Rights had intimate personal familiarity with the details of the trial; of the seven lawyers who represented the bishops, five served the next year on the two House of Commons committees that actually wrote the Bill of Rights, and the chairmen of both committees had been among the bishops' attorneys.⁷⁹

In 1688 James II, the Catholic monarch of protestant England, issued a Declaration of Indulgence suspending the operation of various laws that imposed disabilities on Catholics.⁸⁰ Although his Declaration seems by modern standards an act of enlightened toleration, it was perceived at the time by most English subjects as an assault on the power of Parliament, and as the first step towards the imposition of Roman Catholicism as the state religion. James II provoked particular consternation by requiring, in his capacity as head of the Protestant Church of England, that all prelates read the declaration from their pulpits. That directive was widely disobeyed, and

74. See *infra* text accompanying note 85.

75. 12 Howell St. Tr. 183 (1688).

76. *An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (The Bill of Rights), 1 W. & M., sess. 2, ch. 2 (1688-89), reprinted in 9 Statutes at Large 67 (Pickering 1764).

77. *Id.*; 9 Statutes at Large 67, 69.

78. 12 Howell St. Tr. 183-524 (1688). More than a century later this trial remained such a pivotal event in English history that it was the subject of noteworthy nineteenth-century painting. *The Acquittal of the Seven Bishops, 30th June 1688* (Edward M. Ward (1816-1879)).

79. The lawyers who represented the bishops and subsequently served on the Rights Committees were Sir Heneage Finch, Henry Pollexfen, Sir Robert Sawyer, John Somers, and Sir George Treby. Treby and Somers were the chairmen of the two committees involved. Sir Cresswell Levinz was a member of the House of Lords that approved the Bill of Rights. Of the defense attorneys, only Sir Francis Pemberton appears to have had no connection with the drafting and approval of the Bill of Rights. L. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 246, 302-05, 319 n.38 (1981).

80. *His Majesty's gracious Declaration to all his loving subjects for Liberty of Conscience* (given at Court of Whitehall April 1687 and May 1688), reprinted in 12 Howell St. Tr. 234-39 (1812).

the Archbishop of Canterbury, together with six other bishops, submitted to James a petition explaining their refusal to obey his order and asking to be excused from any obligation to comply. The seven bishops were arrested and prosecuted for seditious libel, the allegedly libelous statement being the petition they had presented to the King. Their subsequent acquittal was the cause of rejoicing throughout England, and a major step towards the Glorious Revolution and the deposing of James II in favor of William and Mary.⁸¹

Although the details of the *Seven Bishops Case* are quite enlightening, the central objection propounded by supporters of the bishops was not that the defendants were innocent of the charges, but that those charges, even if true, did not and ought not constitute a basis for taking legal action against them. Several months after the acquittal of the bishops, William of Orange, in a widely circulated explanation of his reasons for seeking to replace James II as King of England, declared that James's

evil counsellors have endeavored to make all men to apprehend the loss of their lives, liberties, honors and estates, if they should go about to preserve themselves from . . . oppression by petitions, representations, or other means authorized by law. Thus did they proceed with the Archbishop of Canterbury, and the other bishops; who, having offered a most humble petition to the King, in terms full of respect . . . (in which they set forth, in short, the reasons for which they could not obey that order . . . requiring them to appoint their clergy to read in their churches the Declaration for Liberty of Conscience) were sent to prison, and afterwards brought to a trial, as if they had been guilty of some enormous crime. They were not only obliged to defend themselves in that pursuit, but . . . the judges that gave their opinions in their favours were thereupon turned out.⁸²

81. See L. SCHWOERER, *supra* note 79, at 36 (trial of the Seven Bishops was "arguably the most famous legal proceeding of the late seventeenth century, and certainly the most important with respect to the Revolution of 1688-89"); see generally G. ALYMER, *THE STRUGGLE FOR THE CONSTITUTION: ENGLAND IN THE SEVENTEENTH CENTURY* 213 (1958); C. HILL, *THE CENTURY OF REVOLUTION 1603-1714*, at 198-99, 237-39 (1961); J. KENYON, *STUART ENGLAND 244-45* (1978); R. LOCKYER, *TUDOR AND STUART BRITAIN: 1471-1714*, at 361 (1964); J. MILLER, *THE GLORIOUS REVOLUTION* 10 (1983); S. PRALL, *THE BLOODLESS REVOLUTION: ENGLAND 1688*, at 195-202 (1985); J. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689*, at 256-61 (1952); G. TREVELAYAN, *THE ENGLISH REVOLUTION, 1688-89*, at 87-94 (1938).

82. *Declaration of Prince William Henry, Prince of Orange, of the Reasons inducing him to appear in arms in the Kingdom of England for preserving of the Protestant Religion and for restoring the Laws and Liberties of England, Scotland, and Ireland*, quoted in 10 H.C. JOUR. 1688-93, at 1 (1803) (given at the Court in the Hague, Oct. 10, 1688) and E. WILLIAMS, *THE EIGHTEENTH-CENTURY CONSTITUTION, 1688-1815*, at 13 (1970). This declaration was the manifesto of the Glorious Revolution. Its role in English history is probably comparable to that of the Declaration of Independence in American history.

The *Declaration* was distributed from one end of England to the other. "Many thousand copies" were sent across the Channel to be "consigned to some trusty person in London" for distribution. . . . Friends of the prince were given as many as 3,000 copies and asked to distribute them in their counties and among their friends. Bundles of free copies were sent to booksellers, who were invited to sell them at their own profit. Copies were posted through the penny post and sent anonymously to private citizens.

It was not sufficient that the bishops had been acquitted of the charges against them; William of Orange objected that the very apprehension of such charges, and the burden of defending against them, had had what we would today describe as a chilling effect on those who wished to resort to petitions to protect themselves from injustice. The proceedings at issue were criminal rather than civil, but William regarded the financial threat to the estates of the bishops as intolerable, and the defenders of the bishops never suggested that a civil damage action against them would have been any less offensive than criminal proceedings.⁸³

The charges filed against the seven bishops are undeniably the paradigm of the type of accusation that the English petition clause was framed to prevent. It is entirely arguable that the 1689 petition clause was intended as an absolute bar to any legal proceeding based on the contents of a petition.⁸⁴ The terms of the clause certainly seem that sweeping: "[T]he right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal."⁸⁵ At the least the drafters of the English petitioning clause intended to protect petitioners from the sort of allegation made against the petitioners in the *Seven Bishops Case*, and from the legal arguments offered in justification of that proceeding.

All of this is of critical importance to the issue in *McDonald* because the seven bishops were charged, not with violating James II's order that they read his Declaration or with having advocated disobedience by others, but with seditious libel.⁸⁶ The decision in *McDonald*, of course, does not assert that all petitioners can be sued for libel; it holds, rather, that an action for libel is consistent with the petition clause of the first amendment only if the statements in the petition were false and the petitioner "acted with malice."⁸⁷ But that was precisely the allegation made by the Crown against the Archbishop of Canterbury and his six codefendants. The information⁸⁸ in the *Seven Bishops Case* alleged that the defendants

falsely, unlawfully, maliciously, seditiously, and, scandalously did frame, compose and write, and caused to be framed, composed

L. SCHWOERER, *supra* note 79, at 115.

83. None of the defense lawyers disagreed when the Attorney General, during the trial of the seven bishops, remarked regarding the crime of seditious libel: "[I]s there any thing on this side [of] a capital crime that is a greater offence? is there any thing that does so tread upon the heels of a capital offence, and comes so near the greatest of crimes that can be committed against the government?" *The Seven Bishops Case*, 12 Howell St. Tr. at 225.

84. A general argument for virtually absolute protection for the contents of petitions is made in Smith, *supra* note 1, at 1196-97.

85. *An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (The Bill of Rights), 1 W. & M., sess. 2, ch. 2 (1688-89), reprinted in 9 Statutes at Large 67, 69 (Pickering 1764).

86. See *The Seven Bishops Case* for an exchange between Justice Powell and one of the prosecutors:

Just[ice] Powell. The information is not for disobedience, brother, but for a libel.

Ser[geant] Baldock. No, Sir, it is not for disobedience, but it is for giving reasons for the disobedience in a libellous petition

12 Howell St. Tr. at 418-19.

87. *McDonald*, 472 U.S. at 485.

88. Informations were used to initiate criminal proceedings for offenses which affected the King or endangered the government. C. WALKER, *THE OXFORD COMPANION TO LAW* 616-17 (1980).

and written, a certain *false*, feigned, *malicious*, pernicious and seditious libel in writing, concerning our said lord the king, and his royal Declaration and Order aforesaid, (under pretence of a petition), and the same *false*, feigned, *malicious*, pernicious and seditious Libel . . . did publish and cause to be published . . .⁸⁹

If, as *McDonald* holds, petitions containing malicious falsehoods "do not enjoy constitutional protection,"⁹⁰ the very charges levelled against the seven bishops could today, despite the first amendment, support a civil or criminal libel proceeding in federal court.⁹¹ Surely that cannot be correct, for the English petition clause clearly was framed to halt all proceedings based on the type of allegations made by the Crown in the *Seven Bishops Case*, and there is no evidence that the framers of the petition clause in the first amendment intended to give Americans a more restricted right to petition than they had enjoyed as English subjects.

Defense counsel in the *Seven Bishops Case* articulated a specific coherent theory as to why the information filed against their clients was deficient. During the early stages of the trial the prosecution encountered some difficulty proving that the signatures on the petitions were actually those of the defendant bishops,⁹² and that the bishops had "published" the libel by disclosing it to a nonsignatory, the King.⁹³ Eventually, however, the Crown was able to produce witnesses to establish both critical facts.⁹⁴ It is of considerable significance that the prosecution and court never suggested that any of the bishops had "published" the petition by revealing it to one another, but tacitly assumed throughout that the Crown was required to prove that the petition had been exhibited to someone for a purpose other than to obtain his or her signature.⁹⁵ The bulk of the trial, together with the arguments of counsel and the comments and jury instructions of the four judges before whom the case was tried, was concerned primarily with two issues: whether the document in question fell outside the realm of libel law because it was a petition, and whether the petition was accurate when it asserted that the authority claimed by James II to suspend the operation of statutes, the so-called dispensing power, "hath been often declared illegal in parliament."⁹⁶

89. *The Seven Bishops Case*, 12 Howell St. Tr. at 279 (emphasis added).

90. *McDonald*, 472 U.S. at 484 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

91. The Supreme Court appears to apply the same constitutional standards to civil and criminal libel proceedings. See *Garrison*, 379 U.S. at 67 (reflecting distinctions between civil and criminal libel statutes when the criticism is directed at public officials).

92. *The Seven Bishops Case*, 12 Howell St. Tr. at 287-312.

93. *Id.* at 335-57.

94. *Id.* at 423-24 (The Lord Chief Justice summarizes the evidence on those points).

95. See *infra* text accompanying notes 152-54.

96. *The Seven Bishops Case*, 12 Howell St. Tr. at 239, 319. The Crown's arguments in favor of the dispensing power are set out at 12 Howell St. Tr. 402 n.*, 405 n.*, 407 n.*, 407, 410-12. The bishops' arguments to the contrary are at 12 Howell St. Tr. 396-97. The full text of the allegedly libellous petition was as follows:

To the King's most excellent Majesty.

The humble petition of William Archbishop of Canterbury, and of divers of the suffragan Bishops of that province, now present with him, in behalf of themselves and others of their absent brethren, and of the clergy of their respective dioceses,

The bishops raised the right to petition defense early in the trial in response to the wording of the information. The information alleged that the bishops had libeled the King "praetensu petitionsis,"⁹⁷ which the clerk translated to the jury as "under pretence of a petition."⁹⁸ The information quoted the body of the petition, which set forth the bishops' criticism of the dispensing power, but omitted both the heading, which indicated the document had been addressed to the King, and the conclusion, which contained a prayer for relief.⁹⁹ When the clerk began to read to the jury only the portion of the petition contained in the information, counsel for the bishops successfully demanded that the omitted portions be read as well.¹⁰⁰ Defense attorneys then argued that the evidence disproved the allegations of the information, because the bishops had been charged with "a pretended petition," but the proof demonstrated that the full document was in fact a genuine petition, and not simply a gratuitous attack on the dispensing power.

If . . . there be an information . . . that . . . charges a man with a pretended petition, and the evidence comes and proves a petition both top and bottom, that is not the petition in the information: for that lacking the proper parts of a petition, is called a pretended petition, but that which is proved, is proved a real one.¹⁰¹

The attorneys representing the bishops denounced the Crown's apparent

Humbly sheweth; that the great averseness they find in themselves to the distributing and publishing in all their churches your majesty's late Declaration for Liberty of Conscience, proceedeth neither from any want of duty and obedience to your majesty (our holy mother, the Church of England, being both in her principles and in her constant practice unquestionably loyal; and having, to her great honour, been more than once publicly acknowledged to be so by your gracious majesty), nor yet from any want of due tenderness to dissenters, in relation to whom they are willing to come to such a temper as shall be thought fit, when the matter shall be considered and settled in parliament and convocation; but amongst many other considerations, from this especially, because that Declaration is founded upon such a dispensing power as hath been often declared illegal in parliament, and particularly in the years 1662, and 1672, and in the beginning of your majesty's reign; and is a matter of so great moment and consequence to the whole nation, both in church and state, that your petitioners cannot in prudence, honour or conscience, so far make themselves parties to it, as the distribution of it all over the nation, and the solemn publication of it once and again, even in God's house, and in the time of his divine service, must amount to, in common and reasonable construction.

Your petitioners therefore most humbly and earnestly beseech your majesty, that you will be graciously pleased not to insist upon their distributing and reading your majesty's said Declaration.

The Seven Bishops Case, 12 Howell St. Tr. at 318-19.

97. *Id.* at 238.

98. *Id.* at 279.

99. The Latin version of the information, which contains the quoted portion of the petition, is at 12 Howell St. Tr. 238. The English version of the information, at 12 Howell St. Tr. 279, does not quote the petition in full, but merely quotes the first and last words of the petition.

100. *The Seven Bishops Case*, 12 Howell St. Tr. at 318 ("Read the whole petition; I pray, my lord, that the whole may be read. Read the top first, Sir, to whom it was directed.").

101. *Id.* at 321; see also *infra* text accompanying notes 167-69 (well-financed petition could not be basis for libel action).

attempt to provide the jury with a version of the bishops' statement so edited that it did not appear to be a petition at all.¹⁰² The omission, the bishops urged, was not merely a matter of distortion; it fundamentally changed the nature of the legal issues involved.

[T]ake the whole petition together, and . . . it is a reasonable petition; chop off the direction and the prayer, and then here's nothing but the body of a petition, without beginning or ending; . . . if a man will say any thing concerning the king, and do it by way of petition . . . that will *alter the case mightily* from a paper spread about, that should contain only the body of the petition, and nothing else.¹⁰³

Writing in 1985, the *McDonald* Court would dismiss the right to petition as having no independent significance, being but a particular application of the right of free speech.¹⁰⁴ No one in 1688, however, held such a view. In the late seventeenth century, although the existence of a right to petition was widely accepted and understood, there was no comparable recognition of any general right of freedom of speech. The 1689 Bill of Rights, the codification of then prevailing libertarian thought, contained no reference to freedom of speech, and in that year the infamous Licensing Act, which required prior government approval for the printing of any book, was still in effect, having been renewed by Parliament as recently as 1685.¹⁰⁵ Counsel for the seven bishops thus advanced no argument that their clients had any general right to speak about government affairs. The claim they did assert, one which made the omitted portions of the bishops' statement "alter the case mightily,"¹⁰⁶ was that it was "the right of all people that apprehend themselves aggrieved, to approach his majesty by petition."¹⁰⁷ "[H]ow sad the condition of us all would be, if we may not petition when we suffer."¹⁰⁸ The bishops insisted not only that it would be unfortunate if they could be subjected to legal proceedings for submitting a petition, but also that the making of such a petition "sure was *lawful* for all the bishops as subjects to do."¹⁰⁹ "[T]his petition is no more than what any man . . . might humbly do . . . and not

102. *The Seven Bishops Case*, 12 Howell St. Tr. at 320 ("this information and petition do not agree; for they have brought an information, and set forth, that my lords the bishops, under pretence of a petition, did make a libel, and they have set forth no petition at all; all the petitionary part is omitted"); *id.* ("this information hath made a very deformed thing of it, has left neither head nor tail . . . it is without any direction to any body, and without any prayer for any thing; and without those two it cannot be told what it is"); *id.* at 323 ("It is quite another thing; that which is produced, from that which is in the information, by this leaving out a part; for here is the prayer omitted, and the direction."); *id.* at 358 ("They indeed do not deal fairly with the court nor with us, in that they do not set it forth that it was a petition.").

103. *Id.* at 321 (emphasis added).

104. *McDonald*, 472 U.S. at 485 ("The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble."); *id.* at 489-90 (Brennan, J., concurring) (first amendment rights are interrelated).

105. F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776*, at 241-44 (1965).

106. *Id.* at 321.

107. *The Seven Bishops Case*, 12 Howell St. Tr. at 369-70.

108. *Id.* at 395.

109. *Id.* at 359 (emphasis added).

be guilty of a crime."¹¹⁰ The right of the bishops to offer the petition was particularly compelling because the bishops sought to explain why they wished to be excused from obeying a directive of the King.

I think it can be no question, but that any subject that is commanded by the king to do a thing which he conceives to be against law, and against his conscience, may humbly apply himself to the king, and tell him the reason why he does not that thing he is commanded to do, why he cannot concur with his majesty in such a command.¹¹¹

It was harsh and unjust that the Crown, simply by including in the information an allegation that the petition had been written with "malice," should force the bishops to face a criminal proceeding.¹¹²

Counsel for the bishops offered two reasons for protecting petitioners from libel actions that could be properly maintained under other circumstances. First, they insisted that a petition was special because it was a device by which the petitioner not only commented on government affairs, but also prayed for action to redress a grievance. An appeal to the King, they contended, was often the only means by which an aggrieved citizen could secure relief. Second, defense counsel maintained that petitions often facilitated enlightened governmental decisionmaking because they frequently contained information or advice that might persuade the Crown to abandon an imprudent course of action.

The need to protect a mechanism for the redress of grievances was, as we shall see, the traditional basis on which court decisions then accorded to petitions the same absolute protection given to statements in judicial proceedings.¹¹³

[T]here is . . . disingenuity . . . in only reciting the body, and not the prayer.

But . . . taking the petitionary part, and adding it to the other, it quite alters the nature of the thing; for it may be, a complaint without seeking redress might be an ill matter; but here taking the whole together, it appears to be a complaint of a grievance, and a desire to be eased of it.

[T]he subjects have a right to petition the king in all their grievances, so say all our books of law . . . ; they all times have had a right so to do, and indeed if they had not, it were the most

110. *Id.* at 360.

111. *Id.* at 359; *see also id.* at 393 ("the bishops lying under this pressure . . . they by petition apply to the king to be eased of it, which they might do as subjects").

112. Sir R. Sawyer, arguing on behalf of the bishops, stated:

[M]y lords the bishops being grieved in this manner, made this petition to the king in the most private and respectful manner; and for [the Attorney General] to load it with such horrid black epithets, that it was done libellously, maliciously, and scandalously, and to oppose the king and government, 'tis very hard; 'tis a case of a very extraordinary nature, and I believe my lords the bishops cannot but conceive a great deal of trouble, that they should lie under so heavy a charge

12 Howell St. Tr. at 359-60. "[T]o make this to be a libel, by putting in the words malicious, seditious, scandalous, and with an intent to raise sedition, would be pretty hard." *Id.* at 371.

113. *See Part III infra.*

lamentable thing in the world, that men must have grievances upon them, and yet they not to be admitted to seek relief in a humble way.¹¹⁴

The bishops' petition was analogized to a similar request made to a judge:

[S]uppose a justice of peace were making of a warrant to a constable, to do something that was not legal for him to do, if the constable should petition this justice of the peace, and therein set forth, Sir, you are about to command me to do a thing which, I conceive, is not legal; surely that would not be a crime that he was to be punished for: for he does but seek relief, and shew his grievance in a proper way, and the distress he is under.

My lord, this is the bishops' case, . . . they with all humility, by way of petition, acquaint the king with this distress of theirs, and pray him, that he will please to give relief.¹¹⁵

For the proposition that otherwise libelous words in a petition, like similar words in any regular judicial proceeding, could not provide a basis for a legal action against the petition, counsel for the bishops cited *Lake v. King*, the very precedent dismissed by the Supreme Court in *McDonald*. An attorney for the bishops argued,

[I]t concerns them that have no other remedy, to address the king, by petition, about it.

For . . . if a proper remedy be pursued in a proper court, for a grievance complained of, though there may be many hard words that else would be scandalous, yet being in a regular course, they are no scandal: and it is said [in] Lake's case, in my lord Hobart.¹¹⁶

My lord, we must appeal to the king, or we can appeal to nobody, to be relieved against an order . . . with which we are aggrieved . . .¹¹⁷

Lake v. King was the only judicial decision specifically cited by counsel for the bishops to establish that their clients' conduct was entitled to legal protection. In 1845 the Supreme Court would criticize *Lake* as insufficiently "modern," and in 1985 Chief Justice Burger would dismiss *Lake* as "anomalous," but in 1688 *Lake*, then only twenty years old, seemed entirely up-to-date and sound law to the men who defended the seven bishops and who shortly thereafter wrote the petition clause of the English Bill of Rights.

Counsel for the bishops also argued that special protection for petitions was important because the government had need of the information which petitions might contain. The bishops relied in part on a sixteenth-century statute imposing on clerics throughout England an obligation to assure "the due and true execution"¹¹⁸ of the laws establishing

114. *The Seven Bishops Case*, 12 Howell St. Tr. at 393-94.

115. *Id.* at 394.

116. The speaker evidently mistakenly assumed that *Lake v. King* was also reported by Hobart. The case reported by Hobart, however, is *Lake v. Hatton*, decided half a century before *Lake v. King*. *Hatton*, Hob. 252, 80 Eng. Rep. 398 (S.C. circa 1618).

117. *The Seven Bishops Case*, 12 Howell St. Tr. at 364.

118. *Id.* at 364 (citing *An Act for the uniformity of common prayer and service in the church, and*

the Church of England as the official church. The *Seven Bishops Case* arose from James II's attempt to supersede some of those very laws. Defense counsel repeatedly urged on behalf of the bishops that in advising the King that his order was unlawful, "we have done nothing but our duty."¹¹⁹ But the argument was also cast in broader terms:

[S]uppose, my lord (which is not to be supposed in every case, nor do I suppose it in this.) But suppose that there might be a king of England that should be misled. I do not suppose that to be the case now, I say, but I know it hath been the case formerly, that the king should be environed with counsellors that had given him evil advice; it hath been objected as a crime against such evil counsellors, that they would not permit and suffer the great men of the kingdom to offer the king their advice. How often do we say in Westminster-hall, that the king is deceived in his grant: there is scarce a day in the term, but it is said in one court or other; but it was never yet thought an offence to say so: and what more is there in this case?

My lord, if the king was misinformed, or under a misapprehension of the law, my lords, as they are peers, and as they are bishops, are concerned in it; and if they humbly apply themselves to the king, and offer him their advice, where is the crime?¹²⁰

This second rationale for the protection of petitions was significant because it did not rest on, or require the presence of, a prayer for relief; so long as a "petition" provided the King with advice or information that might lead to the correction of "mistaken"¹²¹ government action, the document served an important purpose.

Counsel for the bishops did not contend that all forms of petitioning were beyond legal control or sanction, but they insisted that any constraints could be directed only at the method of petitioning, not at the content of the petition itself. This distinction, they urged, was grounded in a 1661 statute,¹²² adopted at the end of the Interregnum,¹²³ regulating the manner in which petitions were to be organized and presented. That law asserted that "the late unhappy wars, confusions and calamities in this nation" had been caused in part by the "tumultuous and other disorderly soliciting and procuring of hands by private persons to petitions."¹²⁴ To

administration of the sacraments, 1 Eliz. 1 ch. 2, § 15 (1558), reprinted in 6 Statutes at Large 117, 120 (Pickering 1763)).

119. *Id.* at 365; see also *id.* at 368, 371, 395-96 (referring to the King's inability to dispense with laws without an act of Parliament).

120. *Id.* at 368-69.

121. *Id.* at 371 ("For I never thought it, nor hath it ever, sure, been thought by any body else, to be a crime to petition the King: for the King may be mistaken . . .").

122. *An Act against tumults and disorders, upon pretence of preparing or presenting publick petitions, or other addresses to his Majesty or the parliament*, 13 Car. 2, ch. 5 (1661), reprinted in 8 Statutes at Large 6 (Pickering 1763). This statute was also cited by the Kentish petitioners in 1701 as the source of their right to present to Parliament a petition which the House deemed scandalous, insolent, and seditious. D. DEFOE, *THE HISTORY OF THE KENTISH PETITION* (1701), reprinted in 8 AN ENGLISH GARNER: LATER STUART TRACTS 165-66 (G. Aitken ed. 1903).

123. The Interregnum lasted from the execution of Charles I in 1649 to the restoration of Charles II in 1660. See D. WALKER, *THE OXFORD COMPANION TO LAW* 645 (1980).

124. 13 Car. 2, ch. 5, § 1 (1661), reprinted in 8 Statutes at Large 6 (Pickering 1763).

prevent the recurrence of such troubles, the statute made it a crime to solicit the signatures of more than twenty people on a petition, absent prior approval by the local justices or grand jury, or to be accompanied by more than ten people when presenting a petition.¹²⁵ The law also contained, however, the following reservation:

Provided always, that this act, or any thing therein contained, shall not be construed to extend to debar or hinder any person or persons, not exceeding the number of ten aforesaid, to present any publick or private grievance or complaint to any member or members of parliament after his election, and during the continuance of the parliament, or to the king's majesty, for any remedy to be thereupon had¹²⁶

The Bishops insisted this statute amounted to a reaffirmation of the right to petition.¹²⁷ "[A] libel it could not be, because . . . they kept within the bounds set by the act of parliament, that gives the subject leave to apply to his prince by petition, when he is aggrieved."¹²⁸ So long as a person acted in conformity with the procedural requirements of the 1661 statute, the bishops' counsel urged, a petitioner was protected from any action based on the contents of his petition.

The contentions offered by the Crown in an attempt to rebut these defense arguments are as important to the meaning of the English petition clause as the bishops' own arguments. The Crown's position epitomized the view of the law which the defenders of the bishops and the framers of that clause intended to reject. First, the prosecution argued that petitions were not entitled to any treatment different than that accorded to other written materials, such as books. Second, the Crown insisted that, although the prayer for relief in a petition might be protected, the reasons supporting the prayer were not. Third, the prosecution maintained that only those petitions presented to Parliament could be immune from libel actions, not those directed to the King.

The prosecution's first contention corresponded precisely to the position adopted by the Supreme Court in *McDonald v. Smith* that the contents of a petition enjoy no greater legal protection than the substance of any other document. Early in the trial of the Seven Bishops, in response to defense objections that the information omitted critical portions of the actual petition, the Attorney General insisted that "speaking of ill things in the body of a petition" could not be rendered lawful by

giving it the good title of a petition, and concluding it with a good prayer. 'Tis not, I say, any of these that will sweeten this crime, or will alter or alleviate it; if there be that which is seditious and libelous in the body of the writing, call the paper what you will, and smoothing it with a specious preamble, or conclusion, that

125. 13 Car. 2, ch. 5, § 2 (1661), reprinted in 8 Statutes at Large 6 (Pickering 1763).

126. 13 Car. 2, ch. 5, § 3 (1661), reprinted in 8 Statutes at Large 7 (Pickering 1763).

127. *The Seven Bishops Case*, 12 Howell St. Tr. at 392-93 ("[T]he subjects have a right to petition in all their grievances, so says the statute of the thirteenth of the late King; they may petition, and come and deliver their petition under the number of ten, as heretofore they might have done, says the statute . . .").

128. *Id.* at 397.

will [not] make it any thing less a libel.¹²⁹

The Attorney General returned to this argument later in the trial, asserting that "no man will say, that a good preface at the beginning, or a good prayer at the end, should excuse treason or sedition in the body of a book."¹³⁰ When, in his closing argument for the Crown, the Recorder reiterated this suggestion that a petition was no different than a book, he drew a sharp rebuke from Justices Holloway and Powell:

Recorder. . . . [F]or the form of this paper, as being a petition, there is no more excuse in that neither: for every man has as much right to publish a book, or pamphlet, as they had to present their petition. And as it would be punishable in that man to write a scandalous book, so it would be punishable in them to make a scandalous, and a libellous petition. And the author of Julian the Apostate, because he was a clergyman, and a learned man too, had as much right to publish his book, as my lords the bishops had to deliver this libel to the king. . . .

Just[ice] *Holloway.* Pray, good Mr. Recorder, don't compare the writing of a book to the making of a petition; for it is the birthright of the subject to petition.

. . . .

Just[ice] *Powell.* Mr. Recorder, you will as soon bring the two poles together, as make this petition to agree with Johnson's book.^[131] They are no more alike than the most different things you can name.¹³²

The prosecutors argued in the alternative that while the King's subjects might have a right to petition for redress of grievances, the guarantee protected only the request for a particular form of relief, and did not extend to libelous assertions that might be made as part of the argument in support of that request. In the context of *McDonald v. Smith*, this argument suggests that while McDonald would have had an absolute right to urge the President not to nominate Smith as U.S. Attorney, McDonald acted at his peril when he went further and gave reasons for his opposition to Smith. The prosecutors insisted that the bishops might with impunity have prayed for leave to be excused from obeying the King's

129. *Id.* at 322.

130. *Id.* at 402.

131. The author of *Julian the Apostate*, printed in 1682, was Samuel Johnson. See 10 THE DICTIONARY OF NATIONAL BIOGRAPHY 916 (L. Stephen & S. Lee eds. 1921-22). In *Julian the Apostate*, Johnson argued against unconditional obedience and equated "popery" with "modern paganism." After a critical response by George Hickes in 1683, Johnson countered with *Julian's Arts and Methods to undermine and extirpate Christianity*. The Privy Council examined the book's contents, though the book remained unpublished until 1689, and opted to imprison Johnson. Later in 1683, Johnson was convicted of a seditious libel, a conviction based on the contents of *Julian the Apostate*. Johnson's 1686 work, *A Humble and Hearty Address to All the English Protestants in the Present Army*, allowed Johnson to do "more towards paving the way for King William's revolution than any other man in England." *Id.* at 917. He was again prosecuted for the contents of his work. *Id.* at 917-18.

132. *The Seven Bishops Case*, 12 Howell St. Tr. at 419-20. The Recorder was Sir Bartholomew Shower. *Id.* at 419.

order, but argued that the bishops enjoyed no such protection when they went further and, in an attempt to justify that prayer, criticized the actions of the King himself:

[R]easons might have been given, and good reasons should be given, why they should not do this in duty to his majesty; more gentle reasons, and other kind of reasons than those that they have given

. . . .

. . . [The information] is not for disobedience, but it is for giving reasons for the disobedience in a libelous petition The declaration is said in the petition to be illegal; which is a charge upon the king, that he has done an illegal act. They say, they cannot in honour, conscience, or prudence, do it; which is a reflection upon the prudence, justice, and honour of the king in commanding them to do such a thing.¹³³

The Attorney General, making the same argument, insisted that libelous arguments in a petition to the King were punishable because libelous assertions in a petition to a judge would be equally criminal.¹³⁴ Justice Powell immediately recognized that acceptance of that argument would largely eviscerate the right to petition, because petitioners might on this theory be precluded from stating the basis on which their claim for relief was founded. Justice Powell observed, "if they had petitioned, and not have shewn the reason why they could not obey, it would have been looked upon as a piece of sullenness, and that they would have been blamed for as much. . . ."¹³⁵

Finally, the prosecution argued that although the subjects might have a right to petition, that right extended only to petitions submitted to Parliament while in session, not to petitions proffered directly to the King. The Solicitor General contended:

I do agree, that in parliament the lords and commons may make

133. *Id.* at 418-19; *see also id.* at 416-17:

"[I]t is one thing for a man to submit to his prince, if the king lay a command upon him that he cannot obey, and another thing to affront him. If the king will impose upon a man what he cannot do . . . shall he come and fly in the face of his prince? Shall he say it is illegal? and the prince acts against prudence, honour or conscience, and throw dirt in the king's face?"

In this passage the word "submit" appears to refer to submitting a request to be excused from compliance.

134. *Id.* at 399-400:

A man may petition a judge; but if any man in that petition shall come and tell the judge, sir, you have given an illegal judgment against me, and I cannot in honour, prudence, or conscience obey it; I do not doubt, nor will any man, but that he that should so say, would be laid by the heels, though the judgment perhaps might be illegal.

If a man shall come to petition the king, as we all know, the council doors are thronged with petitioners every day, and access to the king by petition is open to every body, the most inferior person is allowed to petition the king; but because he may do so, may he therefore suggest what he pleases in his petition? Shall he come and tell the king to his face what he does is illegal?

135. *Id.* at 417.

addresses to the king, and signify their desires, and make known their grievances there; and there is no doubt but that is a natural and proper way of application: for in the beginning of the parliament, there are receivers of petitions appointed, and upon debates, there are committees appointed to draw up petitions and addresses; but to come and deduce an argument, that because the lords in parliament have done thus . . . therefore my lords the bishops may do it out of parliament, that is certainly a *non sequitur*

. . . .
 The lords may address to the king in parliament, and the commons may do it

. . . .
 . . . [T]hat is the regular legal way. . . . [T]hese being the methods that these lords should have taken, they should have pursued that method; the law should have carved out their relief and remedy for them, but they were for going by a new fancy of their own.¹³⁶

Petitions to Parliament, or addresses in Parliament itself, were "the regular legal way . . . to address and apply to the king" and "to redress grievances" because Parliament had the power to correct any injustice by impeaching the offending official.¹³⁷ Implicit in this argument was a concession that the bishops could not have been prosecuted had the same petition been submitted to Parliament when it met later in the year, rather than to the King. In response to this contention, Justice Powell and the Lord Chief Justice stated that they believed the subjects had the same right to petition the King directly that, as the Crown conceded, they had to petition the Parliament.¹³⁸

Each of the four justices who heard the case offered the jury his own quite distinct view of the law and evidence. Their opinions must be evaluated in the context of their prior and subsequent careers. Both Justice Allybone and the Lord Chief Justice, Robert Wright, were regarded as unduly inclined to do the bidding of the Crown; both had been appointed to the King's Bench in 1687 after James II removed their predecessors for refusing to order the immediate execution of a defendant then under sentence of death.¹³⁹ Justice Holloway, appointed by Charles II in 1683, together with Justice Powell, who had been named to the bench by James

136. *Id.* at 404-09; see also *supra* note 96 (citation to Crown's arguments in favor of dispensing power).

137. *The Seven Bishops Case*, 12 Howell St. Tr. at 403 n.*.

138. *Id.* at 407:

[Here Mr. Justice Powell spake aside to the Lord Chief Justice thus]

Mr. Just[ice] Powell. My Lord, this is a strange doctrine! Shall not the subject have liberty to petition the king but in parliament? If that be law, the subject is in a miserable case.

L.C.J. Brother, let him go on, we will hear him out, though I approve not of his position.

139. *Id.* at 261-63 n.†.

II, were both removed by James II shortly after the completion of the *Seven Bishops Case* because the King was displeased with the manner in which they had acted during the trial.¹⁴⁰

The Lord Chief Justice's comments were the most favorable to the Crown. In his instructions to the jury, the Lord Chief Justice made no mention whatever of the defense argument that the bishops might be entitled to judgment, or at least had a stronger case, because the alleged libel was contained in a petition.¹⁴¹ He instructed the jury that the petition in question was indeed libelous: "[A]ny thing that shall disturb the government, or make mischief and a stir among the people, is certainly within the case of 'Libellis Famosis;'^[142] and I must in short give you my opinion, I do take it to be a libel[.] . . . this being a point of law."¹⁴³ Earlier during the closing argument, the Lord Chief Justice had indicated that while the bishops were entitled to petition the King, that right did not immunize otherwise libelous statements contained in the petition:

I am of opinion that the bishops might petition the king; but this is not the right way of bringing it in. I am not of that mind that they cannot petition the king out of parliament; but if they may petition, yet they ought to have done it after another manner: for if they may in this reflective^[144] way petition the king, I am sure it will make the government very precarious.¹⁴⁵

For the Lord Chief Justice it was of little or no relevance that the libel at issue was part of a petition.

Justice Allynbone, although also instructing the jury that the bishops' statement was libelous, took a more complex and interesting position. Allynbone railed against the notion that ordinary subjects had any right of free speech regarding government affairs:

[N]o man can take upon him to write against the actual exercise of the government, unless he have leave from the government, but he makes a libel, be what he writes true or false; for if once we come to impeach the government by way of argument, it is the argument that makes it the government or not the government. . . . [T]he government ought not to be impeached by argument, nor the exercise of the government shaken by argument

. . . It is the business of the government to manage matters relating to the government; it is the business of subjects to mind only their own properties and interests. If my interest is not shaken, what have I to do with matters of government?¹⁴⁶

If any man had the effrontery to criticize the government in a matter not directly affecting his own interests, that criticism was criminal libel, and that libel was more, not less, egregious if contained in a petition:

140. *Id.* at 263 n.†.

141. *Id.* at 421-26.

142. *The Case de Libellis Famosis, or of Scandalous Libels*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (1605).

143. *The Seven Bishops Case*, 12 Howell St. Tr. at 426.

144. In this context "reflective" appears to mean reflecting adversely on the King.

145. *The Seven Bishops Case*, 12 Howell St. Tr. at 417.

146. *Id.* at 427-28.

[L]et us consider further, whether, if I will take upon me to contradict the government, any specious pretence that I shall put upon it shall dress it up in another form, and give it a better denomination? And truly I think it is the worse, because it comes in a better dress; . . . so that whether it be in the form of a supplication, or an address, or a petition, if it be what it ought not to be, let us call it by its true name, and give it its right denomination—it is a libel.¹⁴⁷

Allybone insisted, however, that the situation would have been different if the bishops had had a financial or other personal interest at stake:

If the government does come to shake my particular interest, the law is open for me, and I may redress myself by law

. . . .

I do agree, that every man may petition the government, or the king, in a matter that relates to his own private interest, but . . .

. . . .

. . . I think these venerable bishops did meddle with that which did not belong to them: they took upon them, in a petitionary, to contradict the actual exercise of the government, which I think no particular persons, or singular body, may do.¹⁴⁸

Although it is unclear what additional rights subjects would have to petition when their own personal interests were at issue, Justice Allybone's comment seems to imply that the libel laws would not apply to such petitions.

Justice Holloway insisted that the bishops should be acquitted if the alleged libel was contained in a bona fide petition:

The question is, whether this petition of my lords the bishops be a libel or no[t]. Gentlemen, the end and intention of every action is to be considered; and likewise, in this case, we are to consider the nature of the offence that these noble persons are charged with; it is for delivering a petition, which, according as they have made their defence, was with all the humility and decency that could be: so that if there was no ill intent . . . to deliver a petition cannot be a fault, it being the right of every subject to petition. If you are satisfied there was an ill intention of sedition, or the like, you ought to find them guilty: but if there be nothing in the case that you find, but only that they did deliver a petition to save themselves harmless, and to free themselves from blame, by shewing the reason of their disobedience to the king's command, which they apprehended to be a grievance to them, and which they could not in conscience give obedience to, I cannot think it is a libel¹⁴⁹

The intent of the defendants mattered to Holloway, but only in a very narrow sense. For Holloway, petitions were absolutely protected if the petitioners were actually aggrieved by the matter about which they com-

147. *Id.* at 428.

148. *Id.* at 428-29.

149. *Id.* at 426.

plained and if they filed the petition for the purpose of redressing that grievance. So long as that was the intent of the petition, the document was a genuine petition, and "the right of every subject to petition" precluded the petition, as "a point of law," from being held a libel.

During the closing argument, Justice Powell insisted that the right to petition ought to include a right to set forth whatever arguments the petitioner thought supported his prayer.¹⁵⁰ In his comments to the jury, however, Powell made no mention of the significance of the petition issue. Rather he directed his statements to the prosecution's evidence, which he found insufficient to demonstrate that the contents of the petition were in fact false, malicious, or tended to sedition.¹⁵¹

Eighteenth-century histories of the events leading to the Glorious Revolution, although less detailed than the account in *Howell's State Trials*, emphasized a number of the key aspects of the *Seven Bishops Case*. David Hume's 1778 *History of England*, for example, reiterated the contention that any petition signed and presented in compliance with the statute of 1661 was protected by law:

The council for the bishops pleaded, that the law allowed subjects, if they thought themselves aggrieved in any particular, to address themselves by petition to the king, provided they kept within certain bounds, which the same law prescribed to them, and which in the present petition the prelates had strictly observed¹⁵²

Hume also asserted, with evident approbation, that the bishops had framed their petition "[i]n order to encourage" other clergymen "in their resolution . . . to preserve the regard of the people" by refusing to read James II's Declaration.¹⁵³ If, as Hume evidently assumed, a petition submitted for such a purpose was within the legal rights of the bishops, it necessarily followed that a petition enjoyed legal protection regardless of whether or not its *sole* purpose was to obtain redress for the petitioner.¹⁵⁴

Whatever else the framers of the English petition clause might have had in mind, they certainly intended the clause to bar completely any future prosecutions similar to the *Seven Bishops Case*, and not merely to throw light on the legal issues that might arise in such criminal proceedings. The framers manifested their intent in the wording of the clause, which declares illegal not only punishment but also "*all commitments . . . for petitioning*."¹⁵⁵ Neither the standard proposed by Justice Powell, nor that of Justice Holloway, would have sufficed to assure that no subject could ever again be arrested for having petitioned the King. Powell was prepared to concede that a petition would constitute criminal libel if its contents were false, seditious, and written with malice; Holloway insisted on absolute protection for bona fide petitions, but evidently would have permitted the criminal

150. See *supra* text accompanying note 135.

151. *The Seven Bishops Case*, 12 Howell St. Tr. at 426-27.

152. 8 D. HUME, *THE HISTORY OF ENGLAND* 264-65 (1780).

153. *Id.* at 262.

154. See *supra* text accompanying notes 121-28.

155. 1 W. & M., sess 2, ch. 2 (1688-89), reprinted in 9 Statutes at Large 67, 69 (Pickering 1764).

prosecution of a petitioner so long as the information alleged that the actual purpose of the petitioner was to encourage sedition rather than to obtain the redress prayed for in the petition. The only legal theory that would have produced the protection contemplated by the 1689 Bill of Rights was that set forth in *Lake v. King* and elaborated by counsel for the seven bishops—that no adverse legal action could be founded on a petition, that any document directed to the government and seeking to redress grievances was legally a petition, and that anyone submitting such a petition was entitled to that immunity, regardless of the reasons given in the body of the petition to justify the requested relief.

III. JUDICIAL DECISIONS

Both the Court and the parties in *McDonald* evidently assumed that *Lake v. King* was an isolated event in English judicial history, without either forbearers or progeny. Had that been the case, and had *Lake* itself remained obscure during the eighteenth century, a plausible argument might have been advanced that there was insufficient evidence on which to base any definitive conclusion regarding the state of the law in 1791. As this section demonstrates, however, the rule applied in *Lake*—that libel actions could not be based on the contents of a petition—had been the law for almost a century before *Lake* was decided and remained unquestioned in the century which followed. By treating similarly pleas for judicial relief and petitions for redress of grievances, English courts afforded even false and malicious petitions absolute immunity, reasoning that any lesser degree of protection would deter subjects from bringing their complaints to the government.

The earliest reported case regarding libel actions based on a petition for redress of grievances is the 1585 decision in *Hare v. Mellers*.¹⁵⁶

Action on the case does not lie for any slanderous words contained in any bill or petition to the queen unless it is published before it is delivered. *Quaere* if the matter in this bill is not examinable in that court; then it seems that an action lies.¹⁵⁷

A "bill . . . to the queen" evidently referred to a civil complaint in the royal courts. The decision suggests that an action might lie for a libelous bill if that bill had been submitted to a royal court, which lacked subject matter jurisdiction over the claim. Indeed, the existence of such a limitation on the immunity accorded to statements in connection with judicial proceedings was well established by the mid-sixteenth century. The absolute privilege for petitions to the Queen, however, was subject to no such restriction, presumably because the Queen had authority to act on any petition. The particular libel claim in *Hare* was based on an allegedly libelous statement made in a bill, rather than in a petition. The court based its dismissal of the libel claim not on a distinct immunity rule for civil actions, but on the fact that a bill exhibited in court, apparently Queen's Bench, was nominally a request for justice addressed to the Queen herself:

156. This case is referred to by slightly different names. *Hare & Mellers Case*, 3 Leon. 138, 74 Eng. Rep. 591 (C.P. 1586); *Hare & Meller's Case*, 3 Leon. 163, 74 Eng. Rep. 607 (C.P. 1587); and *Hare v. Millows*, R. HELMHOLTZ, *SELECT CASES ON DEFAMATION TO 1600*, at 84 (1985).

157. R. HELMHOLTZ, *supra* note 156, at 84.

Hugh Hare . . . brought an action upon the case against Philip Meller, and declared, that the said defendant had exhibited to the Queen a scandalous bill against the plaintiff charging the said Hugh to have recovered against the said defendant 400 [pounds] by forgery, perjury, and foreswearing and cozenage;¹⁵⁸ and also that he published the matter of the said bill at Westm[inster] [etc.] It was said by the Court, that the exhibiting of the bill to the Queen, is not in it self any cause of action; for the Queen is the head and fountain of justice, and therefore it is lawful for all her subjects to resort to her to make their complaints.¹⁵⁹

If English subjects had an absolute right to seek relief from the Queen as the "head and fountain of justice," absolute immunity for statements in civil complaints and in petitions would be but two applications of the same principle. In the United States today, the procedures in civil suits differ greatly from the internal workings of Congress and the executive branch, and appeals for judicial relief are no longer, in either form or substance, prayers for redress from the chief executive. To twentieth-century Supreme Court Justices, as to ordinary Americans, a letter to the President seems totally unlike a formal complaint framed under the Federal Rules of Civil Procedure. At first blush, it might appear surprising that letters and complaints were treated alike for purposes of a libel action, because today, as was true 400 years ago, private letters and civil pleadings are governed by completely different standards in virtually all other contexts. But in the sixteenth century, a civil suit and a petition to the Crown were regarded as simply two different methods of obtaining justice from the government, which in the broadest sense is true even to this day.¹⁶⁰

Although *Hare* recognized an absolute privilege in connection with judicial proceedings, subsequent decisions applying that privilege generally cited either or both of two other late sixteenth-century decisions, *Cutler v. Dixon*¹⁶¹ and *Buckley v. Wood*.¹⁶² *Cutler* is noteworthy because the rationale it offered for this rule was undoubtedly equally applicable to petitions to the monarch:

It was adjudged, that if one exhibits articles to justices of peace against a certain person, containing divers great abuses and misdemeanors, not only concerning the petitioners themselves, but many others, and all this to the intent that he should be bound

158. Foreswearing is false swearing; cozenage is cheating or defrauding a person by some deceitful practice. *BALLENTINE'S LAW DICTIONARY* 287, 492 (3d ed. 1969).

159. *Hare v. Mellers Case*, 3 Leon. 163, 163, 74 Eng. Rep. 607, 607-08. The same passage is to be found in the report of this case at *Hare & Meller's Case*, 3 Leon. 138, 138, 74 Eng. Rep. 591, 591.

160. In colonial times, and into the nineteenth century, colonial and the state legislatures passed on many petitions to resolve disputes between private parties. Note, *supra* note 27, at 145-50.

161. 4 Co. Rep. 14b, 76 Eng. Rep. 886 (K.B. 1585-86).

162. There are reports of this case at 4 Co. Rep. 14; Cro. Eliz. 230, 78 Eng. Rep. 486; and Cro. Eliz. 248, 78 Eng. Rep. 503. There seem to have been a number of other, apparently unreported decisions on this issue in the second half of the sixteenth century. See *Buckley v. Wood*, Cro. Eliz. 230-31, 78 Eng. Rep. 486 (Q.B. 1589-90); cf. *Beauchamps v. Croft*, 3 Dyer 285, 73 Eng. Rep. 639 (1569).

to his good behaviour; in this case the party accused shall not have for any matter contained in such articles any action upon the case, for they have pursued the ordinary course of justice in such case: and if actions should be permitted in such cases, those who have just cause of complaint, would not dare to complain for fear of infinite vexation.¹⁶³

Libel actions were prohibited, even against litigants whose allegedly libelous statements had been made without "just cause," because permitting any such suits would threaten, and deter, grievants who did have justification for their complaints.

The phrase apparently coined in *Cutler* to describe the protected proceedings, a "course of justice," was repeated in *Buckley v. Wood*, as it would be in most decisions on the subject throughout the seventeenth century:

[I]t was resolved . . . that for any matter contained in the bill that was examinable in the said Court, no action lies, although the matter is merely false, because it was in course of justice . . . [F]or words not examinable in the said Court, an action on the case lies, for *that* cannot be in a course of justice; for the Court has no power or jurisdiction to do *that* which appertains to justice . . .¹⁶⁴

Both the court and counsel seem to have assumed that the same immunity rule would apply to civil and criminal libel actions. Although *Buckley* was a civil proceeding, Wood's attorney argued that "the exhibiting of the bill is only in course of justice, and concerneth himself only, and so is not punishable."¹⁶⁵ The court, in rejecting Wood's claim of immunity, noted that the allegedly libelous statements had been made in a bill outside the jurisdiction of Star Chamber, where it had been filed, and held that since Wood had allegedly "exhibited the bill maliciously in slander of the plaintiff for matters not examinable there, it is reason he should be punished."¹⁶⁶

In 1623, the principle announced in *Hare* was sufficiently well established that it was expressly accepted by the plaintiff in *Tanfield v. Hiron*.¹⁶⁷ The alleged libel in *Tanfield* was contained in a document presented to the Prince of Wales, a member of the House of Lords. The defendant asserted that such documents were privileged. The plaintiff acknowledged that a well framed petition could not provide a basis for a libel action, but argued that the document in question was not privileged because, although criticizing the plaintiff, it had failed to seek any specific redress:

163. *Cutler v. Dixon*, 4 Co. Rep. at 14b, 14, 76 Eng. Rep. 886, 886 (K.B. 1585-86) (footnotes omitted).

164. *Buckley v. Wood*, 4 Co. Rep. 14, 76 Eng. Rep. 888, 889 (K.B. 1591-92) (footnotes omitted). For examples of subsequent decisions using the phrase "course of justice," see, e.g., *Anfield v. Feverhill*, 2 Bulst. 269, 80 Eng. Rep. 1113 (1614) (citing *Cutler*); *Weston v. Dobniet*, Cro. Jac. 432, 432, 79 Eng. Rep. 369, 369 (K.B. 1617) (referring to *Cutler v. Dixon* as "*Dixie's Case*"); *Hunter v. Allen*, Palm. 188, 189, 81 Eng. Rep. 1035, 1035 (1612) ("le ordinary course de justice") (citing *Cutler*); *Wheeler and Appleton's Case*, Godb. 339, 340, 78 Eng. Rep. 200, 200 (K.B. 1623) ("action will not lie [if] it is in the ordinary course of justice").

165. *Buckley*, Cro. Eliz. 248, 248, 78 Eng. Rep. 503, 503.

166. *Id.*

167. Godb. 405, 78 Eng. Rep. 239 (K.B. 1623).

Action upon the Case, for delivering of a scandalous writing to the Prince, accusing the plaintiff of injustice and oppressions. Defendant pleaded, that oppressions were committed, etc. and that the writing was delivered to the Prince, as a Peer of Parliament, in order to procure redress, *absque hoc*, that it was delivered in any other manner. Plaintiff demurred to this plea: it was insisted upon in the argument of this case, that the writing, containing only general matter of complaint, without any prayer for reformation, was libellous, and, as it might procure the prince's ill-will to the plaintiff, was therefore punishable¹⁶⁸

Another report of this case sets forth the plaintiff's argument in somewhat greater detail:

Noy for the Plaintiff said, that . . . it is a grievous scandal to deliver this writing; for it is a scandalous writing; and no petition: for therein he doth not desire any Reformation, but complains generally If he had demeaned himself as he ought, he ought to have had the wrong (if there were any) reformed, and that he did not do. . . . He hath not demeaned himself as he ought; for he hath not desired in the letter any Reformation, but only he complains of the oppression of Tanfield: he ought to have directed the writing unto Parliament, and he directed the same unto the Prince by name¹⁶⁹

Against this background, it is understandable why the prosecution in the *Seven Bishops Case* would cleverly have omitted from the information the salutation and prayer in the bishops' petition, and why counsel for the bishops would have demanded that the petition be read in its entirety to the jury.

In 1668-1669, one of the few attempts to found a libel claim on a parliamentary petition occurred in a proceeding filed and litigated in the House of Lords. Although the proceeding was ultimately unsuccessful, the House of Commons regarded the possible precedent as so dangerous that it insisted that all official reports of the action be destroyed.¹⁷⁰ The dispute began when officials of the East India Company seized a ship, cargo, and house belonging to Thomas Skinner and allegedly assaulted Skinner in the process. Skinner sued the East India company and Sir Samuel Barnardiston, who was governor of the company and a member of the House of Commons. Skinner also took the unusual step of bringing his action as an original proceeding in the House of Lords. In the seventeenth century, as today, the House of Lords sat as England's highest appellate court; the conduct there of actions *nisi prius* was, however, quite unusual. The Lords nonetheless decided to give Skinner a hearing, and awarded him 5000 pounds in damages against the company.¹⁷¹ This caused considerable consternation in the House of Commons, because several members of the Commons were also members of the company and—in an era before the

168. STATE LAW, OR THE DOCTRINE OF LIBELS 26 (2d ed.) (for date see *infra* note 217).

169. Godb. 405-07, 78 Eng. Rep. at 239-40.

170. 1 A. GREY, DEBATES OF THE HOUSE OF COMMONS FROM THE YEAR 1667 TO THE YEAR 1694, at 150-211 (1769).

171. *Id.* at 150 & n.*.

advent of limited liability companies—faced personal liability for the judgment. Many members of Parliament regarded the award of damages as a breach of their privileges as members of the House of Commons.¹⁷²

The matter took a new and considerably more ominous turn when Barnardiston and the Company petitioned the House of Commons for redress. This petition raised extraordinarily difficult questions about the relationship between the two Houses of Parliament, each of which was constitutionally independent of the other. On May 2, 1668, the House of Commons adopted a resolution insisting that the action of the House of Lords in awarding damages to Skinner was "not according to the Law of the land."¹⁷³ Lacking any direct manner of compelling the Lords to rescind their order, the Commons then resolved that "Skinner, by commencing and prosecuting suit, in the Lords House, and procuring judgment against the Company, and the Governor, being a Member of this House, and several Members of the House being parties concerned therein, is a breach of privilege."¹⁷⁴ The Sergeant at Arms of the House of Commons thereupon took Skinner into custody.¹⁷⁵

The House of Lords responded by imprisoning and fining Barnardiston.¹⁷⁶ The Lords founded their order for the arrest and punishment of Barnardiston on a resolution that his petition to the House of Commons was a libel.¹⁷⁷ The House of Lords apparently proceeded against Barnardiston under the medieval statute known as *scandalum magnatum*, which declared it a crime to speak or write words in derogation of a peer, judge, or high government official.¹⁷⁸ Parliament adjourned in mid-May 1668, not returning until October of the next year. By late November 1669 cooler heads prevailed in both Houses, and efforts began to find a solution to the impasse. A member of the House of Lords apparently paid Barnardiston's fine,¹⁷⁹ and Sir Robert Carr suggested on the floor of the House of Commons that the Lords were "ashamed" of their "proceedings against Barnardiston."¹⁸⁰ The Lords proposed the adoption of a bill clarifying their authority to hear original proceedings, but the Commons, more concerned with the libel charges founded on Barnardiston's petition, instead requested a conference.¹⁸¹ The House of Commons, in preparation for that conference, adopted a resolution setting forth the bases of its disagreement with the action that had been taken by the Lords. All five paragraphs of that

172. See *id.* at 150-56.

173. *Id.* at 155.

174. *Id.* at 156.

175. *Id.* at 150 n.*, 156 editor's note.

176. *Id.* at 150 n.*, 205, 207. The Lords also imprisoned Sir Andrew Riccard, Rowland Gwynn, and Christopher Boone, who had apparently joined in Barnardiston's petition. *Id.* at 150 n.*, 209.

177. *Id.* at 209 (quoted in text accompanying *infra* note 182), 210 (*Lords Journal* charged Barnardiston and the others with "preparing, contriving, libelling and petitioning" (emphasis omitted)). The Lords also condemned the proceeding of the Commons as illegal. *Id.* at 150 n.*.

178. See 3 W. BLACKSTONE, COMMENTARIES *124-25. The original statute is *None shall report slanderous News, whereby Discord may arise*, 3 Edw. I, ch. 34 (1275), reprinted in 1 Statutes at Large 97 (Pickering 1762).

179. A. GREY, *supra* note 170, at 204-05.

180. *Id.* at 189.

181. *Id.* at 189, 204-08.

resolution dealt with the petition issue, and referred to the power of courts in libel actions because the House of Lords had acted against Barnardiston in its judicial capacity.

1. That it is an inherent right of every commoner of England, to prepare and present petitions to the House in case of grievance, and of the House of Commons to receive them.

2. That it is the undoubted right and privilege of the House of Commons, to adjudge and determine, touching the nature and matter of such petitions, how far they are fit, and unfit, to be received.

3. That no court whatsoever has power to judge or censure any petition, prepared for and presented to the House of Commons, [and received by them,] unless transmitted from thence, or the matter complained of by them.

4. Whereas a petition, by the Governor and Company of Merchants trading to the East Indies, was presented to the House of Commons by Sir Samuel Barnardiston, and others, complaining of grievances therein, which the Lords [have] censured as a scandalous paper, or libel; the said censure and proceeding of the Lords against [the said] Sir Samuel Barnardiston, are contrary to, and in subversion of, the rights and privileges of the House of Commons, and the Liberties of the Commons of England.

5. That the continuance, upon record, of the judgment given by the Lords, and complained of by the House of Commons, in the last session of this Parliament, in the case of Thomas Skinner, and the East India Company, is prejudiced to the rights of the commoners of England.¹⁸²

These objectives rested not only on the freedom of commoners to petition, but also on what we would today characterize as a matter of separation of powers—an argument that the judicial branch of government (for it was in its judicial capacity that the House of Lords had acted) could not interfere in any way with the petitioning process that was critical to the work of the legislative branch. Thus Solicitor Finch was referring to the House of Commons, not to commoners, when he insisted “*our* inherent right in Petitions is and will be eternally true.”¹⁸³ The resolution did not assert that no sanction could ever be imposed on one who petitioned the Commons, but insisted that only the House of Commons itself could do so. The specific dispute between the Commons and Lords was finally resolved when, at the suggestion of the King, both Houses agreed to erase from their journals all references to the entire dispute.¹⁸⁴

By the time of *Lake v. King*, which was argued and decided over a period of years from 1667 to 1671,¹⁸⁵ the existence of an absolute privilege

182. *Id.* at 209-10 (emphasis omitted) (bracketed material in original).

183. *Id.* at 210-11 (emphasis added).

184. *Id.* at 156 editor's note; see also *id.* at 189 n.†, 204 editor's note, 206-07, 209 n.* (referring to the deletion of proceedings from the journals). Grey noted, however, that the records of the proceedings are legible in the original journals. *Id.* at 156.

185. The earliest reported opinions in *Lake v. King* are dated in the Hilary term of the 19th

for petitions was well established; indeed in *Lake*, as in *Tanfield*, the plaintiff does not appear to have suggested otherwise. The allegedly libelous document in *Lake* was a formal request for parliamentary redress, headed "To the honourable the Committee of Parliament for Grievances, the humble petition of Edward King."¹⁸⁶ The petition accused plaintiff Lake, the vicar general to the Bishop of London, "of many horrible and great abuses, such as extortion, oppression, vexation, and other misdemeanors in his office;" Lake alleged in his libel complaint that King's charges were "false and malicious."¹⁸⁷ In response to the action, King insisted that the document in question had been a petition to parliament, being careful to allege, as would have been wise had the petition been part of a judicial proceeding, that Parliament had authority to provide redress:

The defendant pleaded in bar . . . "that . . . he caused to be written and engrossed the said petition . . . and delivered the said petition, containing the same matter as aforesaid, to a Committee then and there constituted and appointed, by the commons then and there assembled in Parliament, to hear and examine the grievances of this realm of England, which said Committee then and there had full power and authority to hear and examine grievances of this kind"¹⁸⁸

Lake does not appear to have claimed that the mere submission of the petition was actionable, even if done with malice; rather, the plaintiff grounded his action on a complaint that King had "caused [the libel] to be printed and delivered, published and dispersed to divers subjects."¹⁸⁹ Lake's attorney appears to have accepted the premise of *Hare v. Mellers* that the principles applicable to petitions and legal proceedings were the same; thus he argued, "It is true, if a man make a complaint in a legal way, no action lieth against him for taking that course, if it be in a competent Court: but that which we say is not lawful in this case, is his causing the matter to be printed and published."¹⁹⁰ Lake's attorney contended that "although the exhibiting of the said petition was lawful, yet the *printing* of it was a publication of it to all the world, which is not lawful to be done in any case . . . [f]or if it were, then, under a pretence of proceeding in a course of justice, a libel might be printed, published, and disbursed of any man throughout the whole kingdom, and yet he should have no remedy."¹⁹¹

The posture of the pleadings in *Lake* was such that the only question was whether copies of a petition could with impunity be printed for, and provided to, the various members of the parliamentary committee. The court concluded that such publication was indeed privileged, but did not

and 20th years of the reign of Charles II, 1 Wms. Saund. 131, 85 Eng. Rep. 137, and the last to the Michaelmas term of the 23d year, 2 Kebl. 832, 84 Eng. Rep. 526. Charles II's regnal years are treated as beginning in 1649. D. WALKER, *supra* note 123, at 1319. Thus, the date of the cases are 1668-69 and 1671 respectively.

186. *Lake v. King*, 1 Wms. Saund. at 131, 85 Eng. Rep. at 138.

187. *Id.*

188. *Id.* at 132, 85 Eng. Rep. at 138.

189. *Id.* at 131, 85 Eng. Rep. at 138.

190. *Lake v. King*, 1 Mod. 58, 86 Eng. Rep. 729 (K.B. 1670).

191. *Lake v. King*, 1 Wms. Saund. at 132, 85 Eng. Rep. at 140.

undertake to decide under what circumstances the petition might also have been furnished to members of the public. In its decision the court noted:

[I]t was agreed that the exhibiting of the petition to a Committee of Parliament was lawful, and that no action lies for it, although the matter contained in the petition was false and scandalous, because it is in a summary course of justice, and before those who have power to examine, whether it be true or false. But the question was, whether the *printing and publishing* of it, in the manner alleged by the defendant in his plea, was justifiable or not?¹⁹²

This characterization of parliamentary action on a grievance as a "course of justice" was of particular significance, because the immunity accorded to statements made in a judicial proceeding was premised on the characterization of such a proceeding as a "course of justice." The use of the same phrase to refer to parliamentary as well as judicial actions signaled that both were being accorded the same protection for a similar reason.

The decision in *Lake v. King* evidently reflected a broader consensus, also apparent in the *Seven Bishops Case*, in opposition to the use of libel actions against petitioners. The intensity of that consensus was revealed in a somewhat extraordinary proceeding early in the reign of William and Mary. In 1695 Thomas Kemp and several other hackney coachmen filed a petition with the House of Commons setting forth several grievances against certain Commissioners, particularly one Richard Gee, who were responsible for licensing and regulating hackney coaches. Gee responded by bringing a libel action against the petitioners, and had the defendants arrested and required to post sureties for their appearance, as was possible at common law when the amount sought in damages was ten pounds or more.¹⁹³ Kemp and his codefendants thereupon filed a second petition with Parliament, complaining that Gee

by his declaration had call'd the petition (by them before presented) a libel, thereby arraigning the proceedings of the House, and discouraging persons from seeking the redress of their grievances; and they pray'd the protection of the House in the premises: And the House referr'd the petition to the Committee of Privileges and Elections, to examine the fact, and report the same with their opinion.¹⁹⁴

The Committee reported that Gee admitted "the arrest and declaration, but confess'd that what he did was out of ignorance, and said 'twas only to vindicate his own reputation."¹⁹⁵ The Committee resolved "That Richard Gee, Esq.; for prosecuting at Law the Hackney-Coachmen for Petitioning the House, was guilty of a breach of Privilege;" the House agreed, and ordered the Sergeant at Arms to take Gee into custody.¹⁹⁶

192. *Id.* at 132, 85 Eng. Rep. at 139.

193. 3 W. BLACKSTONE, COMMENTARIES *287.

194. The proceeding is summarized in ANONYMOUS, ASHBY AND WHITE, OR THE GREAT QUESTION 255-56 (1705).

195. *Id.* at 256.

196. *Id.* (emphasis omitted).

Although it is unclear how long Gee was imprisoned, the arrest of one such libel plaintiff for trying to found a libel suit on a petition evidently proved sufficient, as an eighteenth-century English author subsequently observed, to put "a stop . . . to all such proceedings for the future."¹⁹⁷ This appears to be one of the few instances in English constitutional history in which an individual was actually incarcerated for attempting to interfere with a liberty later embodied in the American Bill of Rights.¹⁹⁸ So far as can be ascertained, between the arrest of Gee in 1695 and the framing of the first amendment a century later, no one in England or the colonies dared to risk Gee's fate by filing a libel action based on the contents of a petition.

In the decades following Gee's incarceration, on the other hand, plaintiffs did make several unsuccessful efforts to found libel actions on statements occurring in the course of judicial proceedings. In one instance, the King's Bench based the immunity for judicial proceedings on the decision in *Lake v. King* according absolute immunity to petitions, reasoning, as had *Hare v. Mellers*, that the protections for petitions and judicial proceedings were the same. In *Astley v. Younge*,¹⁹⁹ decided in 1759, the plaintiff alleged that in an earlier proceeding Edward Younge, the libel defendant, "did wickedly and maliciously make, exhibit and publish to the . . . Court of our lord the King before the King himself, a certain malicious, false and scandalous libel, contained in a certain affidavit in writing of him the said Edward."²⁰⁰ Younge's alleged libel was his assertion that Astley's own statements in that earlier judicial proceeding were untrue. Astley based his subsequent libel action on a claim that the charge of perjury had not been made by Younge for the purpose of winning that earlier lawsuit, but merely "to asperse" Astley.²⁰¹ In rejecting Astley's libel claim, Lord Mansfield assured defense counsel that oral argument was unnecessary because "the matter was so plain."²⁰² The first case cited by Mansfield, in awarding judgment for the defendant, was *Lake v. King*:

In the case of *Lake v. King* . . . the matter charged as the foundation of that action, (which was an action upon the case for printing and publishing a scandalous libel upon the plaintiff,) was contained in a petition to a committee of Parliament for grievances, exhibited in a Court of Justice.^[203] It was agreed "that no action lay for exhibiting the petition, (which was lawful,) although the matter contained in it was false and scandalous: because it was in a summary Court of Justice, and before those who had power to examine whether it was true or false:" and judgment was given for the defendant . . .²⁰⁴

197. *Id.*

198. STATE LAW, OR THE DOCTRINE OF LIBELS 70-71 (2d ed.) (for date see *infra* note 217).

199. 2 Burr. 807, 97 Eng. Rep. 572 (K.B. 1759-60).

200. *Id.* at 808, 97 Eng. Rep. at 573.

201. *Id.* at 809, 97 Eng. Rep. at 574.

202. *Id.* at 810, 97 Eng. Rep. at 574.

203. It is likely that what Mansfield said was not "Court of Justice" but "course of justice." For a discussion of the significance of the "course of justice," see *supra* text accompanying notes 161-65.

204. *Astley v. Young*, 2 Burr. at 810-11, 97 Eng. Rep. at 574 (citations omitted).

The court emphasized that Younge's statements were "justified," not because Younge might have had reason to believe Astley was a liar, but because the mere fact that the disputed statement had been made in a judicial proceeding constituted legal justification. Therefore, the court reasoned, Astley's allegation that Younge had acted with malice was immaterial, "for if the matter is not actionable, the manner is of no consequence."²⁰⁵

In sum, pre-1797 decisions provide precisely what the Supreme Court in *McDonald* asserted did not exist—"clear evidence of the nature of the right to petition as it existed at the time the first amendment was adopted."²⁰⁶ Entirely absent from these decisions was what the Supreme Court believed could be found in subsequent nineteenth-century cases, any "conflicting views of the privilege afforded expressions in petitions to government officials."²⁰⁷ If there is any uncertainty regarding what would have occurred had a case like *McDonald v. Smith* been brought in England in 1791, it could only be about whether or not Mr. Smith would have been imprisoned by the Sergeant at Arms for having had the effrontery to interfere with the petitioning process. The last person prior to 1791 to assert that such suits were maintainable quickly confessed to Parliament that he had acted out of "ignorance";²⁰⁸ the Supreme Court's decision some three centuries later appears to have a similar foundation.

IV. TREATISES

The holding of *Lake v. King*, according to petitions the same absolute privilege afforded to statements in judicial proceedings, was widely recounted in eighteenth-century legal treatises. Many of these treatises were found in colonial libraries and certainly were familiar to the framers of the Constitution. As the following survey shows, treatise writers throughout the eighteenth century not only regarded *Lake* as good law, but also interpreted *Lake* as insulating from libel actions even deliberate falsehoods contained in petitions.

Knightley D'Anvers's *General Abridgment*, first printed in 1705, observed:

If A. exhibits a petition to a Committee of Parliament appointed for the examination of publick grievances, and therein charges B. being a Doctor of Law and Vicar-General to the Bishop of L. with several great offenses, as extortion, etc., in his office, and for the better manifestation of these grievances, causes the said petition to be printed, and to be delivered to several members of the said committee, yet no action upon the case lies; for this printing and delivering of the case as aforesaid, is according to the order and course of proceeding in Parliament.²⁰⁹

For D'Anvers the only uncertain question at issue in *Lake* was whether the

205. *Id.* at 812, 97 Eng. Rep. at 575.

206. *McDonald*, 472 U.S. at 485.

207. *Id.*

208. See *supra* text accompanying notes 195-96.

209. 1 K. D'ANVERS, A GENERAL ABRIDGMENT OF THE COMMON LAW 196 (1705).

defendant could with impunity print and distribute multiple copies of his petition; D'Anvers simply took for granted, as had the court in *Lake* itself, that the original copy of that petition was itself absolutely privileged.

William Bohun's 1713 practice manual, *An Introduction to the Study and Practice of the Laws of England*, devoted several paragraphs to summarizing *Lake v. King*:

The Plaintiff declared for printing and publishing a scandalous libel *in hac Forma*, To the Honourable the Committee of Parliament for Grievances, the humble petition of *E. K. Etc., ad Damp.* 2000 [pounds]. To which the defendant pleaded a justification: And the plaintiff demurred, and the defendant joins.

(1) It was agreed, that the exhibiting the petition to the Committee was legal, and that no action lay, though the matter in the petition was false and scandalous, because exhibited in a Course of Justice, and before those that had power to examine whether or not.

(2) And as to the charge of printing, publishing and dispersing it, the Court held, that it was the order and course of proceeding in Parliament, to print and deliver copies of petitions [to members of the committee].²¹⁰

The absolute immunity extended to remarks by an attorney during the course of a trial was mentioned as a "Note" to the summary of *Lake*.²¹¹

William Hawkins's *Treatise of the Pleas of the Crown*, printed in 1716, cited *Lake* as the source for its summary and explanation of the law:

[I]t hath been resolved, that no false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the Peace exhibited to Justices of Peace, or in any other proceeding in a regular Course of Justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutors, in respect of their applications to a Court of Justice. And the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private matter, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances, to those whom the law has appointed to determine them.²¹²

Hawkins, like the court in *Lake*, subsumed both petitions and court actions under the general rubric of "proceedings in the course of justice." This treatment of the issue in *Pleas of the Crown* is of particular importance because Hawkins's book was one of the most widely used legal tracts in the eighteenth century.²¹³

210. W. BOHUN, *INSTITUTIO LEGALIS: OR, AN INTRODUCTION TO THE STUDY AND PRACTICE OF THE LAWS OF ENGLAND* 310-11 (1713).

211. *Id.* at 311.

212. 1 W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 194 (1716) (footnotes omitted).

213. H. JOHNSON, *IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700-1799*, at xi, 62 (1978).

Thomas Wood's 1724 *An Institute of the Laws of England*, also widely circulated in the colonies,²¹⁴ contains a somewhat more obscure summary of the law:

False or scandalous matter in a legal proceeding in a regular course of justice (as by bill of complaint, petition, articles, etc.) will not amount to a libel, if the court, or the person applied to, hath jurisdiction of the cause.²¹⁵

This would probably have been understood as encompassing petitions for redress of grievances, both because it expressly includes petitions, and because it refers to applications to persons as well as applications to courts, although the matter is not free of doubt.²¹⁶

The anonymous *State Law, or the Doctrine of Libels*, first printed between 1726 and 1734,²¹⁷ was quite unambiguous, providing a two-page summary of *Lake v. King* and noting the somewhat different accounts of the case in the various reports:²¹⁸

An action was brought for publishing a libel; the publication was, in delivering several printed papers, in which the plaintiff was slandered, to several members of the House of Commons. . . . [T]he case was, that the defendant had petitioned the House against the plaintiff, and that those Papers were only Copies of his petition for the members information. . . . [T]he Court adjudged this publication lawful, and gave judgment for the defendant.²¹⁹

State Law suggested that the lawsuits such as that brought by Lake "will never come into practice again," because "a stop has been put to all such proceedings in the future"²²⁰ by of the action of Parliament against Gee.

A New Abridgment of the Law by Matthew Bacon, originally printed in 1736-66 and found in many colonial law libraries,²²¹ squarely argued that the absolute privilege accorded to petitions, which was recognized in *Lake*, was but an application of the same principle that gave rise to the privilege for judicial proceedings:

4. *Whether any proceedings in a Court of Justice will amount to a libel.*
It seems to be clearly agreed, that no proceeding in a regular Course of Justice will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecutions, in respect of their applications to a Court of Justice; and the chief intention of the law in prohibiting persons

214. *Id.* at 56-57.

215. T. WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* 431 (1724).

216. Wood notes that certain proceedings in chancery were commenced by petition. *Id.* at 19, 533.

217. *State Law, or the Doctrine of Libels* contains no date of publication, but the era in which it was printed can be deduced from its dedication in the preface to Solicitor General Talbot. Sir Charles Talbot served as Solicitor General from 1726-1734. D. WALKER, *supra* note 123, at 1334.

218. See *supra* note 185.

219. *STATE LAW, OR THE DOCTRINE OF LIBELS* 34-35; see also *id.* at 70 (noting reports of *Lake v. King* differ, but ultimately hold publication of petition is lawful).

220. *Id.* at 70.

221. H. JOHNSON, *supra* note 213, at 5, 59.

to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them. *Therefore* it hath been resolved, that no false or scandalous matter contained in (a) a petition to a committee of Parliament, or in (b) articles of the peace exhibited to Justices of the Peace, are libelious.²²²

In a footnote, Bacon cited *Lake v. King* and Hawkins's *Pleas of the Crown* to support his view of the privilege accorded to petitions.²²³

Charles Viner's *General Abridgement of Law and Equity*, first published in 1742-53 and found in numerous colonial law libraries,²²⁴ also included an account of *Lake v. King*:

The printing of a charge of extortion in his office, against the vicar general of the bishop of L. and delivering it to several members of the committee of parliament for examination of grievances is justifiable; but if he had delivered it to others it had been otherwise; and the printing them, which is a publishing of them to the printers and composers, is not so great a publication, as to have so many copies transcribed by several clerks . . . *Lake v. King*.²²⁵

Viner noted that Hawkins had accepted *Lake* as authoritative.²²⁶ Viner referred to the privilege extended to statements in judicial proceedings only in a side note commenting on *Lake*.

John Raynor's 1765²²⁷ *A Digest of the Law Concerning Libels* discussed *Lake v. King* immediately following its summary of the privilege accorded to judicial proceedings. Raynor's juxtaposition suggested that the rationale for the privilege accorded to judicial proceedings applied equally to statements in petitions, and thus explained the holding of *Lake v. King*:

It seems to be clearly agreed, that no proceedings in a regular Course of Justice will make the complaint amount to a Libel; for it would be a great discouragement to suitors to subject them to public prosecutions, in respect of their applications to a Court of Justice; and the chief intention of the Law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the Law has appointed to determine them. 3 *Bac. Abr.* 494.

The printing [of] a charge of extortion in his office, against the Vicar General of the Bishop of L. and delivering it to several members of the Committee of Parliament for the Examination of Grievances, is justifiable; but if he had delivered it to others, it had

222. 3 M. BACON, A NEW ABRIDGEMENT OF THE LAW 494 (4th ed. 1778).

223. *Id.* at 494 n.b (citing *Lake v. King*, 4 Co. Rep. 14; 1 W. HAWKINS, *supra* note 212, at 194).

224. H. JOHNSON, *supra* note 213, at 59.

225. C. VINER, GENERAL ABRIDGEMENT OF LAW AND EQUITY 85 (2d ed. 1793) (emphasis omitted).

226. *Id.*

227. There is also a 1778 edition.

been otherwise; and the printing them, which is a publishing of them to the printers and composers, is not so great a publication, as to have so many copies transcribed by several clerks . . . *Lake v. King*.

....

The above case of *Lake v. King* is reported by so many, and so differently, that it is with difficulty we learn, that it was adjudged for the Defendant . . . [A] Stop has been put to all such proceedings for the future, by the interposition of *Commons*: They resolved that all petitions to them were lawful, or at least only punishable by themselves, by the Vote of the 9th of *February* 8 W. 3 in the case of *Kemp v. Gee*, in which *Gee* is voted guilty of a breach of privilege, in suing *Kemp* and others for a libel, which supposed libel was contained in a petition by them presented to the House for redress of grievances.²²⁸

Raynor's commentary is taken almost verbatim from earlier treatises; the first paragraph from Bacon and Hawkins,²²⁹ the second from Viner,²³⁰ and the third from *State Law*.²³¹

Francis Buller's *Introduction to the Law Relative to Trials at Nisi Prius*, published in 1773, treated *Lake* as announcing a general principle of which the immunity for remarks made in the course of a trial was only one of several applications:

In *Lake* and *King*, (which was an Action for printing a Libel suite) it was holden that an action would not lie for printing a petition to Parliament, and delivering it to the members, it being agreeable to the course and proceedings in Parliament. And *Cutler and Dixon* 4 Co. 14.,^[232] is to the S.P.²³³

"To the S.P." appears to mean to the same point. As was noted earlier,²³⁴ *Cutler v. Dixon* was an unsuccessful libel action founded on articles presented to justices of the peace in an attempt to have Cutler bound to his good behavior.²³⁵

Finally, Isaac Espinasse's 1790 *Digest* placed the holding of *Lake v. King* under a general rule regarding legal proceedings:

But nothing shall be construed a libel which is necessary in the

228. J. RAYNOR, A DIGEST OF THE LAW CONCERNING LIBELS 17-18 (1765). The citation to "Bac. Abr." is to Matthew Bacon's *New Abridgement of the Law*. See *supra* text accompanying notes 221-23.

229. See *supra* text accompanying notes 212-13, 221-23.

230. See *supra* text accompanying note 225.

231. See *supra* text accompanying note 219.

232. *Cutler v. Dixon*, 4 Co. Rep. 14b, 14, 76 Eng. Rep. 886, 886 (K.B. 1586).

233. F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 6 (4th ed. 1785). The first edition was printed 1733.

234. See *supra* text accompanying notes 161-64.

235. *Cutler v. Dixon*, 4 Co. Rep. 14b, 14, 76 Eng. Rep. 886, 886 ("In this case the party accused shall not have for any matter contained in such Articles any action upon the case, for they have pursued the ordinary course of justice in such case: and if actions should be permitted in such cases, those who have just cause of complaint, would not dare to complain for fear of infinite vexation.").

course of legal proceedings, and is relevant to the matter which is before the court.

As where the plaintiff declared, "That he being a doctor of laws, and vicar general to the Bishop of *Lincoln*, that the defendant had presented, and caused to be printed a *petition to parliament*, charging him with divers crimes; as extortion, oppression, and corruption in his office:" the action was held not to lie, the petition being the necessary and usual mode of complaint to parliament for any redress of grievance. . . .

6. So no matter which is stated in any *memorial or petition for the redress of grievances, and addressed in the proper channel, by which such redress may be had*; that is, to the persons only who have power to give such redress, shall be deemed libelous.²³⁶

A side note indicated that the case referred to was of course *Lake v. King*. Although published shortly before the framing of the first amendment, Espinasse's *Digest* evidently reached the United States with dispatch; the Yale Law School library possesses a copy of the 1790 edition which bears the signature of Roger Sherman, a member of the 1787 constitutional convention who served in the House from 1789-91 and in the Senate from 1791 until his death in 1793.

V. THE MEANING OF THE FIRST AMENDMENT PETITION CLAUSE

In 1791 there was a well-established common-law rule barring libel actions based on the contents of a petition. That rule had been constantly reiterated in judicial opinions and legal treatises for over a century. At the end of the eighteenth century not a single commentator or reported decision questioned in any way the holding of *Lake v. King*. Had McDonald written his letter opposing the nomination of Smith to President Washington or to George III, rather than to President Reagan, a libel action by Smith would have been dismissed out of hand.²³⁷

Viewed from an historical perspective, the common-law prohibition against libel actions founded on petitions was not a particular application of a more general free speech principle, but the result of institutional considerations at least as relevant today as they were three centuries ago. In England petitions and lawsuits were regarded as simply two different ways in which an aggrieved subject might request redress from the government. Although one could conceivably disagree about whether libel suits would impermissibly deter such requests, the common-law rule appears to have

236. 2 I. ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 505-06 (2d ed. 1793). The first edition was printed in 1790.

237. The decision in *McDonald* did not purport to reconsider the previous rule that testimony before a legislative committee is absolutely privileged. See Comment, *A Qualified Privilege for Defamatory Nontestimonial Communications Made in the Course of Petitioning*, 12 WM. MITCHELL L. REV. 769, 770-71 & n.12 (1986) (citing cases). If that rule still applies, *McDonald* means that an already overburdened Congress can only get access to controversial information by holding a formal hearing. A citizen with information of importance to Congress may have to visit Washington in person in order to avoid the risk of a libel suit, and such a potential witness, like Colonel Oliver North, must refuse to tell a congressional committee or staff what he or she has to say until called before a formal meeting of the committee.

been virtually unchallenged. Legal writers regarded any distinction between libel rules for petitions and for judicial proceedings as making no more sense than separate libel rules for statements made in actions on the case and statements made in actions in trespass. Ironically, even *White v. Nicholls* acknowledged, indeed premised its holding on, the principle that petitions and lawsuits should be governed by the same libel doctrines; the existence of different constitutional standards for petitions and lawsuits did not emerge until the 1986 decision in *McDonald* itself.

The inevitable effect of a distinction between petitions and judicial proceedings is to encourage, at times perhaps even compel, grievants with serious but potentially libelous complaints to file lawsuits rather than seek redress from elected officials. If *McDonald* could have concocted a relevant albeit far-fetched legal theory, he might with impunity have filed a federal lawsuit seeking to enjoin Smith's appointment, rather than risk financial disaster by taking the traditional course of writing to the President and Congress. Under the decision in *McDonald*, individuals who feel they have been mistreated by an IRS agent or a police officer must think twice before complaining to the officer's superiors, but have no similar reason to hesitate about taking the matter to court. Coming from a Supreme Court which repeatedly has insisted that grievants ought address their grievances to legislative and executive officials, rather than bring them to federal judges, the incentives created by *McDonald* seem perverse indeed.

The Parliament of 1669 also recognized an institutional problem that is today uniquely relevant to the American federal system. If a petitioner can be mulct in damages for an allegedly libelous petition, the governmental body which passes on the merits of libel claims will have a direct and potentially decisive ability to restrict the flow of information to the officials who would otherwise receive such petitions. The problem in 1669, of course, was interference by the House of Lords with petitions to the House of Commons. In our own times, similar difficulties could arise in other ways. Had it ever occurred to racist southern officials that they could bring state libel actions against blacks who complained to the Justice Department or to Congress about racial discrimination, such lawsuits—if permitted by the Supreme Court—would have been a potent weapon in the hands of state officials determined to obstruct federal desegregation efforts. It would be equally intolerable if state courts had the power to impose substantial libel verdicts on defendants because they had complained to federal authorities about the failure of state officials to comply with federal environmental, safety, or other laws. Although it is difficult to imagine federal judges attempting to protect their own interests by punishing complaints submitted to the other branches of the national government, the federal courts might well be dragooned into doing so by other disgruntled federal officials. If, for example, Robert Bork were to bring a libel action against those who testified or lobbied against his nomination to the Supreme Court, judges might well find themselves in the constitutionally impossible position of being required to decide in that lawsuit whether the charges against Bork, although generally believed by the Senate and indeed the American public, were in reality false and utterly baseless. The wisdom of the common-law rule and of the resolution of 1669 is that they prevent such institutional conflicts from arising.

The majority and concurring opinions in *McDonald v. Smith* suggest that, by placing the rights to freedom of speech, peaceable assembly, and petitioning in the same amendment, Congress intended the first amendment to afford comparable degrees of protection to each of those rights.²³⁸ This syntactical argument is far too weak to support the extraordinary conclusion that the framers actually wanted to reduce the scope of the then existing right to petition. It is virtually inconceivable that the framers intended to afford American citizens a lesser degree of protection if they complained to the President or Congress than the Colonists had enjoyed when, as British subjects, they complained to the King or Parliament. None of the states which proposed the adoption of a federal petition clause suggested that it be linked to freedom of speech.²³⁹ In the state bills of rights, state petition clauses were always set forth separately from provisions regarding freedom of speech or freedom of the press.²⁴⁰ It is not to be believed that Congress intended the federal Bill of Rights to afford a lesser degree of protection to a petition submitted to the federal government than was accorded by state constitutions to a similar petition submitted to state officials. It is even less likely that Congress sought, through the seemingly benign device of locating the petition clause in a guarantee with other rights, coyly to emasculate the rights requested by several states.²⁴¹ Indeed, there is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the petition clause harbored any objection to or intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states.

There is in the structure of the first amendment a change of significance to *Lake v. King*, but not the alteration suggested by the Supreme Court in *McDonald*. *Lake v. King*, it will be recalled, left some doubt regarding whether a petition would be protected if its contents were shown to anyone other than an official with authority to provide the requested redress, and other cases suggested that such broader distribution might well subject the petitioner to an action for libel.²⁴² In the *Seven Bishops Case*, on the other hand, the Crown did not argue that the bishops had "published" the allegedly libelous petition by showing it to one another, and no judicial decision suggested that the distribution of a petition to fellow petitioners

238. 472 U.S. at 485; *id.* at 489-90 (Brennan, J., concurring).

239. The state resolutions are set forth in 3 B. SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* (1980). For examples, see 3 *id.* at 681 (Massachusetts); 4 *id.* at 735 (Maryland); 4 *id.* at 842 (Virginia); 4 *id.* at 913 (New York); 4 *id.* at 968 (North Carolina).

240. The state petition clauses are set forth in 2 *id.* at 266 (Pennsylvania) (freedom of speech and press in section xii; right to petition in section xvi), at 277-78 (Delaware) (right to petition in section 9; free press in section 23), at 287 (North Carolina) (free press in section xv; right to petition in section xvii), at 324 (Vermont) (freedom of speech and press in section xiv; right to petition in section xviii), at 372-73 (Massachusetts) (freedom of speech and press in section xvii; right to petition in section xx), and at 378-79 (New Hampshire) (free press in section xxii; right to petition in section xxxii).

241. The free speech and petition clauses were not grouped together in Madison's initial draft of the Bill of Rights. 1 ANNALS OF CONG. 494 (J. Gales ed. 1789) (comments by James Madison on June 8, 1789, in House of Representatives), reprinted in 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1026 (1971).

242. See *supra* text accompanying notes 192-93.

could impair the immunity of the petition signers. Indeed, *Lake* itself recognized that the petitioning process would at times involve some disclosure to individuals other than the recipient officials, noting that a petitioner might employ a clerk to prepare by hand additional copies. But the significance of that acknowledgment in *Lake* and the *Seven Bishops Case* was limited by the 1661 English statute which provided that, absent special government approval, no more than twenty individuals might be asked to sign certain petitions. It was no coincidence that the petition in the *Seven Bishops Case*, although purporting to seek redress for all church officials, was signed by only seven of them, and not by any significant proportion of the hundreds of clerics actually affected and, presumably, aggrieved.

The Supreme Court wrote in *McDonald* that the right to petition was under "attack" in England in "the 1790's"²⁴³ because a statute adopted in 1795 established limits on petitioning similar to those of the 1661 law.²⁴⁴ What the Court failed to recognize, however, was that the first amendment was framed to prevent the imposition of precisely such restrictions on the number of people who could sign or support a petition. The punctuation and particular phrasing of the amendment is of substantial importance:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.²⁴⁵

Speech and press seem on the face of the amendment to be interrelated, being set off by semicolons; peaceably assembly and petitioning are, similarly, grouped together. More importantly, however, the last phrase refers to "the right," not "the rights" "peaceably to assemble, and to petition." The word "right" is in the singular, a choice which indicates that the framers in this phrase were concerned not with assembly as a generalized liberty, although such a guarantee may well be inherent in the free speech clause,²⁴⁶ but with assemblies that were part of the petitioning process. In England prior to the adoption of the 1661 statute,²⁴⁷ as was true during the abolitionist petition campaigns before the Civil War,²⁴⁸ the process of soliciting petition signatures and support was utilized as a critical opportunity to win over the public to the cause of the petition. An assembly calling for a change in government policy, be it a rally at Madison Square Garden or a march along Pennsylvania Avenue, is as sacrosanct a part of the petitioning process under the first amendment as were the private discussions between the Archbishop Canterbury and his colleagues in the

243. *McDonald*, 472 U.S. at 484 n.5 (citing I. BRANT, *THE BILL OF RIGHTS* 245 (1965)); cf. Smith, *supra* note 1, at 1187 & n.203 ("common law development for the Bill of Rights cuts off in 1791").

244. See Smith, *supra* note 1, at 1159, 1186-87. That 1661 law was still in effect in the eighteenth century. *Id.* at 1159, 1163-65.

245. U.S. CONST. amend. I.

246. There is considerable evidence indicating the framers held that view. See Smith, *supra* note 1, at 1175.

247. Note, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 571-72 n.14 (1987).

248. W. WIECK, *supra* note 27, at 184.

Church of England. The phrasing of the amendment undoubtedly reflects an intent to prohibit measures, such as the 1661 statute, severely limiting the number of individuals who could join in or present a petition, and to place within the protections of the petition clause, including the protections it afforded against libel actions, any peaceable concerted speech or action taken to influence the course of government conduct.²⁴⁹

VI. CONCLUSION

The sixteenth-, seventeenth-, and eighteenth-century materials set forth above demonstrate with unusual clarity that the Supreme Court's decision in *McDonald v. Smith* yielded a result almost certainly contrary to the framers' intent concerning the petition clause. If, in the fullness of time, the Supreme Court adopts an interpretation of the clause consistent with its historical background, there will be, as the Court seems to have understood in *McDonald*, major changes in the constitutional aspects of libel law.²⁵⁰ But

249. All of the state guarantees of the right to petition contained a similar reference to the right of peaceable assembly. None of the state guarantees of freedom of speech referred to freedom of assembly. See *supra* note 240.

Blackstone's *Commentaries*, although making no specific mention of the libel problem, emphasized that under English law restrictions on petitioning were limited to the manner of petitioning, rather than imposing any sanctions based on the claims of a petition if they proved incorrect:

If there should happen any uncommon injury, or infringement of . . . rights . . . which the ordinary course of law is too defective to reach, there still remains a . . . right, appertaining to every individual . . . of petitioning the king, or either house of parliament, for the redress of grievances. In Russia, we are told that the czar Peter, established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, there are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the [1661] statute 13 Car. II. [sess. 1, ch. 5] that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter therefor be approved by three justices of the peace, or the major part of the grand jury . . . nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the [1689 Bill of Rights] that the subject hath a right to petition . . .

1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 142-43 (St. G. Tucker ed. 1803) (footnotes omitted).

St. George Tucker, the editor of the 1803 American edition of *Commentaries*, added a footnote to Blackstone's description of the constraints imposed by the 1661 statute, observing that "[t]he right of petitioning is not subject to any limitation or restriction in the United States." *Id.* at 143 n.39.

250. The absolute immunity that would exist under the petition clause would be limited to statements seeking or arguably directed at eliciting some action or redress by the government, or encouraging others to seek such action or redress. This charge would be a more modest one than Professor Meiklejohn's proposal for absolute immunity for all comments on public affairs. Meiklejohn, *Public Speech and Libel Litigation: Are They Compatible?*, 14 HOFSTRA L. REV. 547, 548 (1986).

there are broader lessons to be learned as well. In response to conservative demands for greater emphasis on the intent of the framers, liberals have sensibly insisted that the framers often did not have, indeed could not have had, any specific intent with regard to many of the problems faced by the courts in the late twentieth century. Throughout this debate, however, all parties seem to have assumed that greater fidelity to the intent of the framers would result in a narrowing of the constitutional protections currently recognized by the Supreme Court; in this instance, at least, precisely the opposite is the case.

The outcome in *McDonald* also demonstrates the practical difficulties inherent in attempting to base twentieth-century judicial opinions on eighteenth-century law. The lawyers and judges who participate in cases such as this are trained as lawyers and judges, not historians; they are conversant with the contents and methodology of United States Reports and LEXIS, not with English Reprints or Viner's *Abridgement*. There are a few dozen legal historians in the United States or Great Britain who might have known what authorities to consult to ascertain whether *Lake v. King* was good law in 1791, but practicing lawyers and busy judges are not a great deal more likely to be conversant with such materials than they would be to understand the state of anthropology or etymology in the late eighteenth century. The actual brief for petitioner in *McDonald* was, as briefs go, quite scholarly; yet, perhaps understandably, none of the briefs referred to *Hare, Tanfield, Astley v. Younge*, or the case of Kemp and Gee, to any of the relevant eighteenth-century legal treatises, or to the detailed arguments in the *Seven Bishops Case*.²⁵¹ *McDonald* was argued on March 20, 1985, and decided ninety-one days later.²⁵² The Court had little time for research of its own, and evidently did none; the majority opinion cites only six pre-twentieth-century authorities, and all of them were mentioned in the briefs of the parties.²⁵³ Indeed, there is good reason to doubt whether anyone on the Court ever actually read *Lake v. King*, because the Court's opinion, carrying forward an error evidently taken from the briefs of the parties, incorrectly dates that decision in 1680.²⁵⁴

251. The only mention of the report in Howell's State Trials was to the jury instructions of Justice Allybone. Brief for Petitioner at 15, *McDonald v. Smith*, 472 U.S. 479 (1985) (No. 84-476).

252. June 19, 1985.

253. Compare *McDonald*, 472 U.S. at 482 (citing 1689 Bill of Rights and 4 PARL. DEB. (1st ser. Cobbett) (1669)) with Brief for Petitioner, at 13-14 (same citation); compare *McDonald*, 472 U.S. at 483 n.4 (citing *Lake v. King*) with Brief for Petitioner, at 15, 19, 22 (same citation); compare *McDonald*, 472 U.S. at 484 n.5 (citing summary of late eighteenth century legislation in I. BRANT, THE BILL OF RIGHTS (1965)) with Brief for Petitioner, at 19 n.34 (same citation); compare *McDonald*, 472 U.S. at 482 (citing 1765 resolution of the Stamp Act Congress) with Brief for Petitioner, at 16 n.25 (same citation); compare *McDonald*, 472 U.S. at 483 (citing 1776 Pennsylvania Declaration of Rights) with Brief for Petitioner, at 18, 24 (same citation); compare *McDonald*, 472 U.S. at 482 (citing 1 ANNALS OF CONG. 738) with Brief for Petitioner, at 26 (same citation).

254. Compare *McDonald*, 472 U.S. at 483 n.4 (citing *Lake v. King*, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K.B. 1680)) with Brief for Petitioner at vii, 15 and Brief for Respondent at v, 22 (citing as *Lake v. King*, 1 Saund. 131 (1680)). The particular report cited by the parties and the Court is that in 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K.B.), which reports decisions from the 19th and 20th years of the reign of Charles II. Charles II's first regnal year was 1649, although the Interregnum did not end until 1660; thus the 19th and 20th years are 1667-68.

The extent to which the interpretation of the Constitution and Bill of Rights should turn on the intent of the framers is, and will remain, a matter of considerable disagreement. But if, as is surely the case, that intent is to have any role in constitutional adjudication, the Supreme Court must be sensitive to the danger that attorneys and judges alike will lack the expertise necessary to canvass fully the relevant historical materials. The Court has several available approaches for dealing with this potential problem. The Court can, in an appropriate case, request the views of the Solicitor General or another amicus, and, given sufficient time, might undertake to research issues not sufficiently addressed by the parties. The problems involved may not be insolvable, but the Court ought bear in mind, when faced with a case turning on such historical matters, that the information that results from the normal adversarial process may at times be insufficient to provide a basis for a sound opinion.

The date of 1680 was evidently arrived at by making two distinct errors: first, assuming the regnal years commence at the end of the Interregnum, and second, adding 20 to the commencement date, thus failing to count the first year of Charles's reign. Even if Charles had become King in May of 1660, 1680 would be the 21st year of his reign, not the 20th. It is unlikely that the Court, by coincidence, made on its own the same errors as counsel. *See generally* GUIDE TO LAW REPORTS AND STATUTES 66-67 (3d. ed. 1959) (containing table of regnal years of English sovereigns).

Similarly, counsel for petitioner, referring to late eighteenth-century English restrictions on petitioning, cited I. BRANT, *THE BILL OF RIGHTS* 245 (1965). Brief for Petitioner, at 19 n.34. The material referred to is actually on page 244. The *McDonald* Court also mistakenly cites page 245 rather than page 244. *McDonald*, 472 U.S. at 484 n.5.

